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A TREATISE

ON THE

New York Laws Relating to Elections

BY

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IN THE HEARST-McCLELLAN RECOUNT

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MEMBER OF THE LAW COMMITTEE OF TAMMANY HALL

"The right of suffrage is one of the most valuable and sacred rights which the constitution has conferred upon the citizen of the state."

People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175, 178

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Preface

The object of this treatise is to furnish an exposition of the New York laws relating to elections, which will serve as a text-book for lawyers, a manual for election officers and election workers, and a primer for the busy citizen who, with little time to spare, yet wishes to familiarize himself with the working of the election law and the nature of the various reforms, which, from time to time, are being advocated. The law relating to elections is contained in the state constitution, in an election law of five hundred and seventy-one sections, in the penal law, in the code of civil procedure and in various special acts. The author's professional and political activities have made him somewhat familiar with the general subject and he has attempted to bring some degree of order out of chaos and to write a treatise which will fill each of the three purposes just enumerated and do so completely, systematically, accurately, concisely and clearly. Such has been his modest ambition during the months he has labored, and he submits the finished work to the public with mingled hope and fear.

JOHN G. SAXE.

NEW YORK, *September* 1, 1913.

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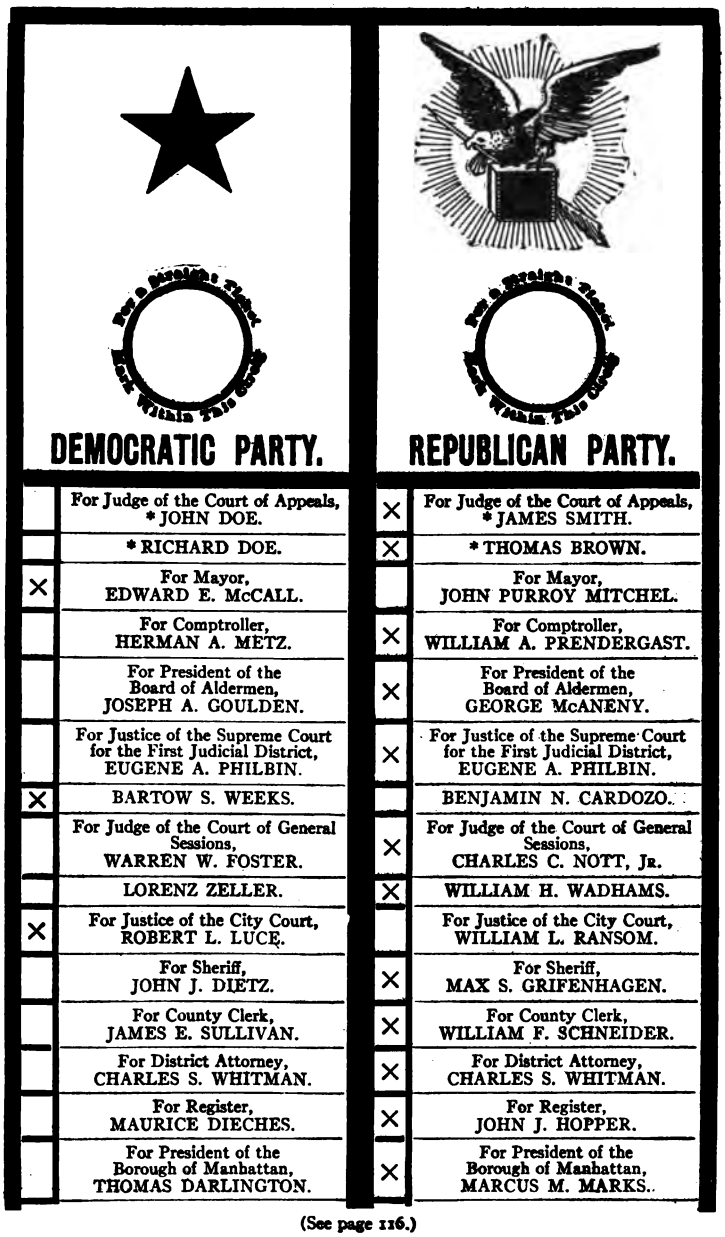

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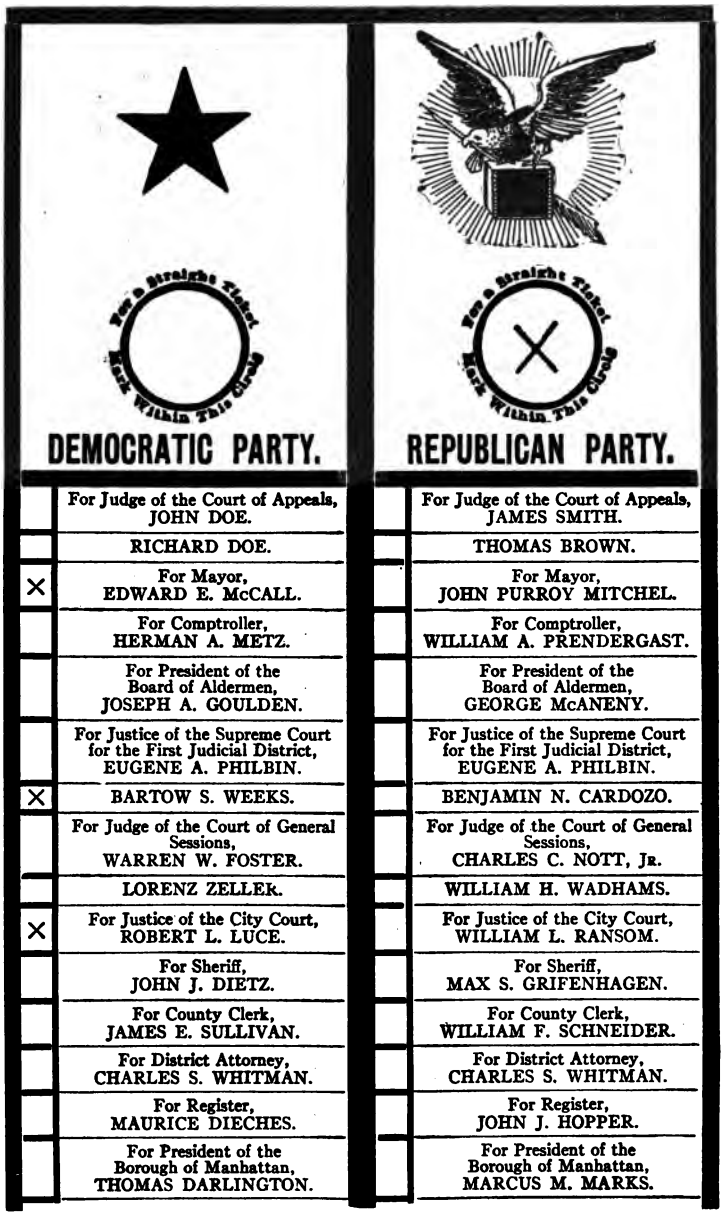
Fig. 1.

* NOTE. As this treatise goes to print, nominations have not yet been made for Judges of the court of Appeals.



(See page 116.)

Fig. 2.

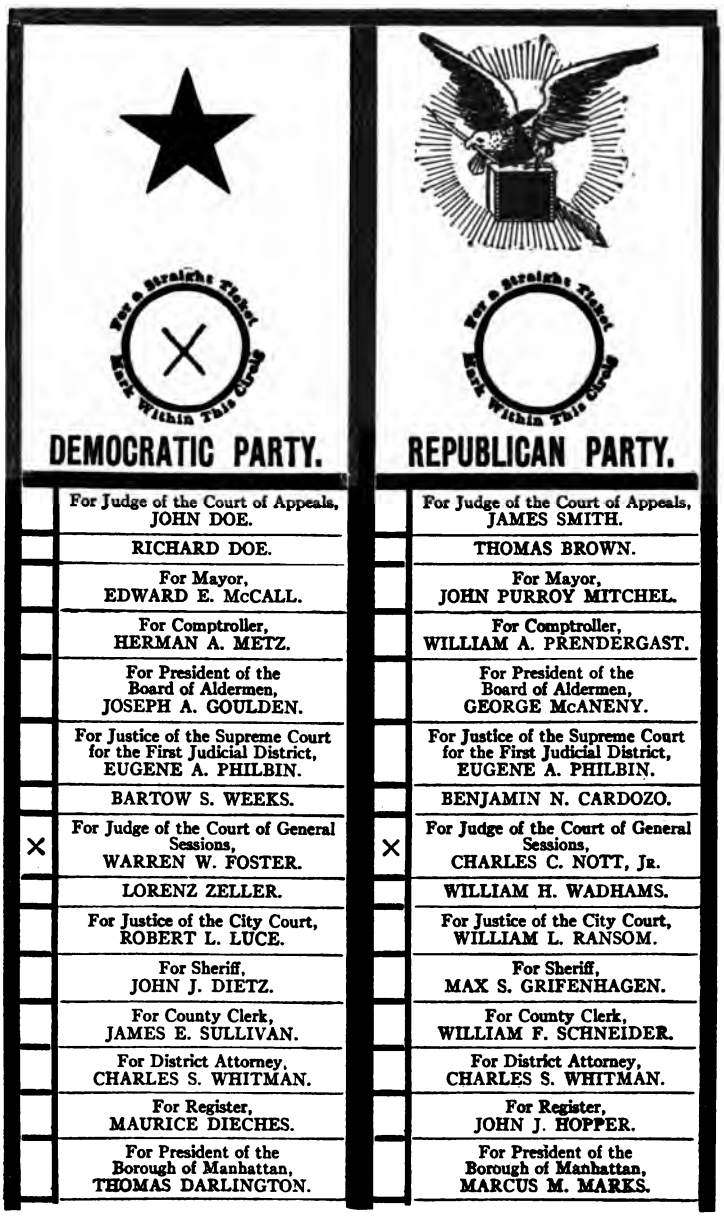
DEMOCRATIC PARTY.

REPUBLICAN PARTY.

	For Judge of the Court of Appeals, JOHN DOE.		For Judge of the Court of Appeals, JAMES SMITH.
	RICHARD DOE.		THOMAS BROWN.
	For Mayor, EDWARD E. McCALL.		For Mayor, JOHN PURROY MITCHEL.
	For Comptroller, HERMAN A. METZ.		For Comptroller, WILLIAM A. PRENDERGAST.
	For President of the Board of Aldermen, JOSEPH A. GOULDEN.		For President of the Board of Aldermen, GEORGE McANENY.
	For Justice of the Supreme Court for the First Judicial District, EUGENE A. PHILBIN.		For Justice of the Supreme Court for the First Judicial District, EUGENE A. PHILBIN.
X	BARTOW S. WEEKS.		BENJAMIN N. CARDOZO.
	For Judge of the Court of General Sessions, WARREN W. FOSTER.		For Judge of the Court of General Sessions, CHARLES C. NOTT, Jr.
	LORENZ ZELLER.		WILLIAM H. WADHAMS.
X	For Justice of the City Court, ROBERT L. LUCE.		For Justice of the City Court, WILLIAM L. RANSOM.
	For Sheriff, JOHN J. DIETZ.		For Sheriff, MAX S. GRIFENHAGEN.
	For County Clerk, JAMES E. SULLIVAN.		For County Clerk, WILLIAM F. SCHNEIDER.
	For District Attorney, CHARLES S. WHITMAN.		For District Attorney, CHARLES S. WHITMAN.
	For Register, MAURICE DIECHES.		For Register, JOHN J. HOPPER.
	For President of the Borough of Manhattan, THOMAS DARLINGTON.		For President of the Borough of Manhattan, MARCUS M. MARKS.

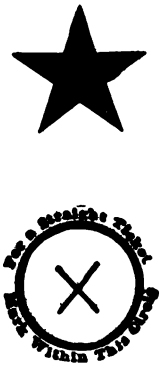
(See page 116.)

Fig. 3



(See pages 116–117.)

Fig. 4.



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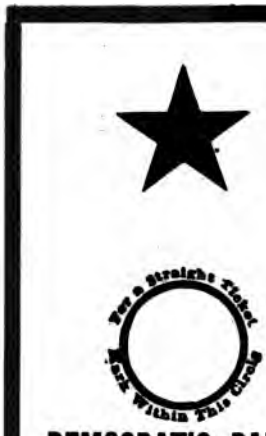

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	For District Attorney, CHARLES S. WHITMAN.
	For Register, JOHN J. HOPPER.
	For President of the Borough of Manhattan, MARCUS M. MARKS.

(See page 117.)

Fig. 6.

REPUBLICAN TICKET.

	For Governor, BENJAMIN B. ODELL, Jr.
	For Lieutenant-Governor, FRANK W. HIGGINS.
	For Secretary of State, JOHN F. O'BRIEN.
	For Comptroller, NATHAN L. MILLER.
	For Treasurer, JOHN G. WICKSER.
	For Attorney-General, HENRY B. COMAN.
	For State Engineer and Surveyor, EDWARD A. BOND.
	For Associate Judge of the Court of Appeals, WILLIAM E. WERNER.
	For Justice of the Supreme Court for the First Judicial District, ERNEST HALL.
	ALFRED STECKLER.
X	WILLIAM ALBERT KEENER.
	For Representative in Congress for the Eighteenth Congressional District, FRANK C. SCHAEFFLER.

DEMOCRATIC TICKET.

	For Governor, BIRD S. COLER.
	For Lieutenant-Governor, CHARLES N. BULGER.
	For Secretary of State, FRANK H. MOTT.
	For Comptroller, CHARLES M. PRESTON.
	For Treasurer, GEORGE R. FINCH.
	For Attorney-General, JOHN CUNNEEN.
	For State Engineer and Surveyor, RICHARD W. SHERMAN.
	For Associate Judge of the Court of Appeals, JOHN CLINTON GRAY.
	For Justice of the Supreme Court for the First Judicial District, EDWARD B. AMEND.
	VERNON M. DAVIS.
X	EDWARD E. McCALL.
	For Representative in Congress for the Eighteenth Congressional District, JOSEPH A. GOULDEN.

(See page 117.)

Fig. 7.

Part First

THE CONSTITUTION

ARTICLE I

THE CONSTITUTION AND ITS INTERPRETATION

Tripartite System: The constitution of the State of New York, adopted in 1894, recognizes the tripartite system of government which is the foundation of American liberty. The legislative department makes the laws, while the executive executes and the judiciary construes and applies them. (Matter of Davies, 168 N. Y. 89; Matter of Guden, 171 N. Y. 529.) The constitution vests the legislative power in the senate and assembly (Constitution, Article 3, Sec. 1), the executive power in the governor (Article 4, Sec. 1), while the courts are vested with jurisdiction in law and equity. (Article 6.) Each, within its sphere, is intended to be independent of the others. (Matter of Reynolds, 144 App. Div. 458.)

Legislative Power: In view of the fact that the constitution confers the legislative power upon the senate and assembly, any and all legislation is a valid exercise of legislative power unless it violates some provision of the constitution. The general legislative power is absolute and unlimited, except as restrained by the constitution. (People *v.* West, 106 N. Y. 293; Sherrill *v.* O'Brien, 188 N. Y. 185, 199.) The legislative power has no other limitation. The theory that laws may be declared void when deemed opposed to natural justice and equity, al-

though they do not violate any constitutional provision, has been repudiated by numerous authorities. (Bertholf *v.* O'Reilly, 74 N. Y. 509, 514–515.) Courts do not sit in review of the discretion of the legislature or determine upon the expediency or wisdom or propriety of legislative action. (People *ex rel.* Sturgis *v.* Fallon, 152 N. Y. 1, 11.) They have repeatedly declared that there is room for much bad legislation and misgovernment within the pale of the constitution, but, whenever this happens, the remedy which the constitution provides, by opportunity for frequent renewals of legislative bodies, is far more efficacious than any which can be afforded by the judiciary. (People *v.* Draper, 15 N. Y. 532, 545; Kittinger *v.* Buffalo Traction Co., 160 N. Y. 377, 388–389.)

Election Laws: There is nothing peculiar about election laws in any of these respects. Subject to the restrictions and limitations of the constitution, the power of the legislature to enact election laws is absolute and uncontrollable (Ahern *v.* Elder, 195 N. Y. 493); and before a court declares a statute invalid which makes any enactment in relation to elections, it should clearly appear that the statute is irreconcilable with the constitution. (Hopper *v.* Britt, 203 N. Y. 144).

Implied Unconstitutionality: In determining the constitutionality of a statute, regard must be had, not merely to the constitution itself, but to the decisions of the court interpreting the constitution, for, under the constitution, it is the courts which must determine, in the last analysis, whether or not the legislature, in a given case, has violated the provisions of the constitution. A statute which violates the express terms of the constitution is obviously unconstitutional, and the determination of that fact involves no difficulty, but, since no constitution was ever drawn so as to be an effective foundation for the government of a state, without applying thereto the doctrine of

implication, the courts have also held that whatever is necessary to render effective any provision of a constitution must be deemed implied and intended in the provision itself. (Fraser *v.* Brown, 203 N. Y. 136.) In other words, constitutions, like other instruments, necessarily contain certain propositions which the instruments import, as well as those they expressly and in terms assert. Therefore, legislation contravening what a constitution necessarily imports is void equally with the legislation contravening its express commands. (Hopper *v.* Britt, 203 N. Y. 144.)

ARTICLE II

FRANCHISE, RIGHTS AND PRIVILEGES OF MEMBERS OF THE STATE

Franchise of Voters: The constitution provides that "no member of this state shall be disfranchised, or deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." (Article 1, Sec. 1.) It also defines the qualifications and disqualifications of voters (Article 2, Sec. 1), and expressly authorizes the legislature to make laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage and for the registration of voters." (Article 2, Sec. 4.)

Voting: The constitution thus guarantees freedom in voting (Hopper *v.* Britt, 204 N. Y. 524) and the power of the legislature to regulate elections must be so exercised as not to deny or impair the franchise, rights and privileges of members of the state. (Matter of Callahan, 200 N. Y. 59.) If the ballot does not contain the name of an office to be voted for, it is within a voter's constitutional rights to write in the name of such office and his candidate

therefor. (People *ex rel.* Goring *v.* President, 144 N. Y. 616.) Any method of holding an election which would deprive voters free from fault or personal misfortune of the right of casting their ballots and having effect given to the votes so cast is unconstitutional. (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99, 108.)

Nominating: The voter's franchise is not only the right to vote for public officers at general and special elections, but it also includes the right to participate in the general methods established by law for the selection of candidates to be voted for. (Burke *v.* Terry, 203 N. Y. 293; People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231.)

Equality of Opportunity: The constitution requires equality of opportunity. The present blanket ballot would be unconstitutional if it did not afford the illiterate voter an opportunity to vote by securing assistance, and to every voter the right to vote for whom he chooses, by writing a candidate's name in the blank column. (People *ex rel.* Bradley *v.* Shaw, 133 N. Y. 493; Hopper *v.* Britt, 203 N. Y. 144.) It would be unconstitutional if it allowed only the names of party candidates to be printed on the official ballot to the exclusion of candidates named by considerable bodies of citizens acting independently of party (Burke *v.* Terry, 203 N. Y. 293); and the provisions of statutes requiring a prohibitory number of signatures to independent nominating certificates are obviously unconstitutional. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231, as supplemented and modified by People *ex rel.* Woodruff *v.* Britt, 206 N. Y. 246; Matter of O'Brien, 206 N. Y. 694.) Legislation must not discriminate in favor of one set of candidates against another set of candidates, and a provision which prohibits a committee of a party from nominating a candidate already nominated by another party or independent body is unconstitutional. (Matter of Callahan, 200 N. Y. 59.) The fundamental

principle that equality of opportunity must be afforded to voters also invalidates a provision that the name of a candidate shall be printed but once upon the ballot, for it means that the name of a candidate nominated by two parties can be printed in only one party column and consequently requires the voters of the other party to make two crosses in order to vote a straight ticket, and the constitution guarantees to the voter the right to express his will by a single mark if others are given the right to express their vote by a single mark. (Hopper *v.* Britt, 203 N. Y. 144; Hopper *v.* Britt, 204 N. Y. 524.)

Emblems: There are dicta to the effect that emblems are "necessary." (Hopper *v.* Britt, 204 N. Y. 524.) There would certainly be unfair discrimination if one set of candidates on a ballot could have an emblem and the others not; although a provision giving party designating committees the right to use the party emblem as against other party members at primary elections has been held to be simply a guide to intelligent choice, because the committees are the official representatives of the party for the time being. (Hopper *v.* Britt, 204 N. Y. 524; *post*, p. 64.)

Proper Safeguards for Independent Nominations: Where nominators, in filing an independent nominating certificate, choose to file several separate sheets of signatures, the legislature may lawfully provide that no such separate sheet shall be received, if five per cent of the names thereon are fraudulent or forged. Such a provision, while it may tend to throw out valid signatures because of invalid ones on the same sheet, is nevertheless constitutional; for it does not necessarily throw out valid signatures, since the effect of the provision may be obviated either by using a single sheet or by filing a separate sheet for each signature (*post*, p. 73; Burke *v.* Terry, 203 N. Y. 293). A provision that the name of no person signing an independent certifi-

cate of nomination shall be counted unless the signer is or becomes registered has been sustained as tending to prevent fraud and to make more certain the good faith of the signers; and a provision prohibiting an enrolled member of a party from signing an independent certificate of nomination for a candidate of his own party for the same office, has also been sustained as tending "to prevent a wrongful use of independent nominations." (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; *post*, p. 70.)

ARTICLE III

QUALIFICATIONS AND DISQUALIFICATIONS

Qualifications: The constitution prescribes the qualifications and disqualifications of voters. The qualifications are as follows: Male sex. Twenty-one years of age. A citizen for ninety days. An inhabitant of the state for one year. A resident of the county for four months. A resident of the election district for thirty days. These qualifications entitle the voter to vote at the election in the election district of which he, at the time, shall be a resident (and not elsewhere) for all offices that are made elective by the constitution and upon all questions submitted. (Article 2, Sec. 1.)

Male Suffrage: Constitutional officers can only be voted for by males. (Matter of Gage, 141 N. Y. 112.)

Woman's Suffrage: The legislature of 1913 agreed to a constitutional amendment authorizing woman's suffrage, by striking from the constitution the word "male" and making it clear that a voter, otherwise qualified, may vote regardless of the sex to which he "or she" belongs, but containing a limitation that "a citizen by marriage shall have been an inhabitant of the United States for five

years." This amendment must be referred to the legislature of 1915 (the legislature to be chosen at the next general election of senators) and, if that legislature agrees thereto, must be submitted to the people for approval. In view of the favorable planks in the New York State platforms of all the parties, the amendment will probably be agreed to by the legislature of 1915 and doubtless approved by the people in November, 1915. If so agreed to and approved, it will become a part of the Constitution from and after January 1, 1916. (Article 14, Sec. 1).

Majority: A man becomes of age the day before his twenty-first birthday. (Hancock, A.-G., A.-G. Rep. of 1897, p. 301; A.-G. Rep. of 1898, p. 283.)

Thirty Days: The thirty days' residence required must be complete on the day of election and, in computing the time, the first and the last days cannot both be counted. (People *v.* Brennan, Bischoff, J., Law Journal, October 25, 1901.)

Disqualifications: The disqualifications consist in the improper use or receipt of money in connection with elections and wagering on the result of elections. Upon challenge for such cause, the person so challenged, before the officers shall receive his vote, shall swear or affirm that he has not done any of the acts prohibited. The legislature is directed to enact laws excluding from the right of suffrage all persons convicted of bribery or any infamous crime. (Article 2, Sec. 2.)

Legislative Powers: The constitution thus prescribing the qualifications and disqualifications of voters, the legislature is without power to prescribe additional qualifications or disqualifications. It may enact laws excluding persons convicted of bribery or any infamous crime. It may make laws for ascertaining, by proper proofs, who are entitled to the right of suffrage and for the registration of voters (Article 2, Sec. 4), but, at that point, its powers

end; and the courts, from time to time, have been called upon to determine whether some requirement of the election law amounts to an additional qualification, or whether it is a proper law for ascertaining, by proper proofs, who is entitled to the right of suffrage. So long as laws do not add to the qualifications required of electors by the constitution, the legislative will is supreme. (Ahern *v.* Elder, 195 N. Y. 493.)

Additional Oath: At or about the close of the Civil War, the legislature passed a law requiring voters to take oath that they had never voluntarily borne arms against the United States, and it was held that this amounted to the creation of a disability and a restriction of the right of suffrage and was unconstitutional. The provision was also held to be unconstitutional in that it deprived the voter of his rights without regard to the law of the land. (Green *v.* Shumway, 39 N. Y. 418.)

Signing Register: In a more recent case, the courts considered a provision of the election law relating exclusively to cities of a million or more inhabitants, requiring the elector, at the time of registration, to sign his name to the registry book, and, in a case where he could not write, to undergo additional cross-examination, and held that this provision did not prescribe an additional qualification, but, on the contrary, its general scope was such as to bring it within the express command of the constitution, and that it was a reasonable regulation designed to secure accurate information concerning the qualifications of voters, including a proper method of identification. (Ahern *v.* Elder, 195 N. Y. 493.)

Absolute Right to Vote. Election Officers: The courts have repeatedly held that, under the system of elections in New York, inspectors of election act only ministerially, and when a person legally qualified offers to vote and is willing to take the general oath prescribed

by statute and takes it, his vote *must be received* (People *ex rel.* Sherwood *v.* Board, 129 N. Y. 360), even though he refuses to answer some question other than the statutory questions (Goetcheus *v.* Matthewson, 61 N. Y. 420), or his answers are unsatisfactory (People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175), or some one else has previously voted on his name. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) An attempt to arrest a voter when he demands to be allowed to vote is itself a violation of the constitution. (People *v.* Hochstim, 76 App. Div. 25.) It, therefore, would seem that a statute which attempts to confer judicial power upon inspectors and authorize them to determine summarily the right of the voter to vote would violate a voter's constitutional rights, and the courts have so held. Thus, in a case where certain inspectors claimed the right to act on independent knowledge and to refuse to allow certain persons to vote, although the latter had satisfied the statutory test, Gray, J., speaking for an unanimous court of appeals, said: "I must say, that, to my mind, this claim is as unreasonable, as it is absolutely lacking in support in the fundamental, or in statutory law. It is repugnant to fundamental principles and to authority. I may fairly premise what brief discussion I may feel bound to enter upon, in connection with the law regulating elections in this state, with the remark, that if these appellants are right in their contention, then a way is made possible to perpetrate a great outrage upon the rights of electors. Under the present scheme of nonpartisan boards of election inspectors, wherein the principal political parties in the state are intended to have equal representation, by a contumacious refusal of party adherents to sign an election return, based on the pretense that they were not satisfied in their minds that all of the ballots taken were cast by qualified and registered electors, the disfranchisement of all the

electors in the election district could be effected. They could prevent the reception of a ballot from a proposed elector, on their theory that a ballot is not finally received until by action of the majority of the board; for they would only have to oppose to the proofs required by the election law and made by the person, their mental convictions that, notwithstanding them, he was not the elector he swore he was. I do not, and cannot think such a result was ever intended, or can be fairly reached upon a consideration of the law. It is inconceivable that any such power should be lodged in election inspectors; or that they should be clothed with a discretion to reject a ballot offered by a proposed elector, whose qualifications, in case of challenge, are proved by the statutory methods. . . . To say that the right of the elector to cast ballot is subject to board action is equivalent to saying that they have power to decide upon the evidence as to the unlawfulness of the vote. That cannot be so. That would permit of an elector's rights being adjudged away and himself disfranchised, and on only such evidence as the statute prescribes. The unlawfulness of a vote cannot be determined until it has been received, and an elector's rights cannot be annulled without a trial, where he may have an opportunity of bringing forward his proofs and having them passed upon in a proper way and by a proper tribunal. To hold any other doctrine we would have to disregard the spirit of our laws and the fundamental idea of an electoral franchise." (People *ex rel.* Stapleton *v.* Bell, 119 N. Y. 175.)

The other questions relating to a voter's qualifications and disqualifications arise under statutory provisions and are more appropriately considered elsewhere (*post*, p. 77).

ARTICLE IV

RESIDENCE

Location of Polling Place: The constitution, as has already been pointed out, makes residence a necessary qualification for voting. The voter must have been a resident of the county for four months and of the election district for thirty days. (Article 2, Sec. 2.) He shall then be entitled to vote in the election district of which he shall at the time be a resident "and not elsewhere." The provision that he cannot vote elsewhere means that he must vote at the polling place designated for casting the votes of the district where he resides; and his vote is not void if the polling place is just without the district so that he actually votes outside the district of his residence. (People *ex rel.* Lardner *v.* Carson, 155 N. Y. 491.)

Residence: Residence for the purpose of registering and voting depends primarily on the intent of the voter, intent as expressed by overt acts, if overt acts there are, but, if there are no overt acts, then intent as declared by the voter, known with certainty only to himself, without likelihood of contradiction. (Carmody, A.-G., A.-G. Rep. of 1911, p. 333.) Residence is not a matter of arbitrary choice, in the sense that a voter who has established a domicile and voting residence at one place may, suddenly and without moving, change his residence to some other place by merely saying he elects to do so, but it depends on an actual and not an imaginary living place. (People *v.* Ellenbogen, 114 App. Div. 182, 188, affirmed 186 N. Y. 603; Silvey *v.* Lindsay, 107 N. Y. 55.) Yet, it is primarily a matter of intention, in that a voter who has established a domicile and voting residence may leave the place and still retain his voting residence thereat. Absence, how-

ever long, so that it is temporary and not in abandonment of home, will not deprive a voter of his residence, though his absence extend through a series of years. (People *v.* Platt, 117 N. Y. 159, 167; Hart *v.* Kip, 148 N. Y. 306, 309; Hislop *v.* Taaffe, 141 App. Div. 40; Carmody, A.-G., A.-G. Rep. of 1911, p. 114.) In short, a voting residence may be in one place and actual abode in another. (Matter of Goodman, 146 N. Y. 284, 288; Carmody, A.-G., A.-G. Rep. of 1911, p. 333.)

Mills Hotels and Other Irregular Homes: A voter may legally register from a hotel or lodging house, where he spends only occasional nights (Jackson, A.-G., A.-G. Rep. of 1908, p. 412), or from a lighter occasionally attached to a pier. (Matter of Collins, 64 How. Prac. 63, Freedman, J.) Demolition of the voter's residence after registering does not affect his right to vote therefrom. (Cunneen, A.-G., A.-G. Rep. of 1903, p. 473.) Where a voter has kept his voting residence at his former home, his son, on becoming of age, may vote from there also. (Ainsworth, A.-G., A.-G. Rep. of 1906, p. 278.)

Losing or Gaining a Residence: The constitution also contains a provision that, for the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, or engaged in the navigation of the waters of this state, the United States or the high seas, or a student of any seminary of learning, or kept at any almshouse or other asylum or institution wholly or partly supported at public expense or by charity, or confined in any public prison. (Article 2, Sec. 3.) The plain reading of this provision is that the sojourn indicated has no effect whatever, one way or another, on the question of legal residence for the purpose of voting. (Matter of Barry, 164 N. Y. 18.) It does not mean that the voter cannot secure a new residence in his new place of sojourn,

but it means that, in determining whether he has secured such a new residence, the fact of his presence or absence is without any significance whatever. It settles a disputed question as to the effect of such presence, and declares that it does not constitute a test of a right to vote and is not to be so regarded. (Silvey *v.* Lindsay, 107 N. Y. 55.) It is only in quite exceptional cases that the voter can secure a new residence under the circumstances specified (Matter of Goodman, 146 N. Y. 284) and most of the efforts to escape from the constitutional inhibition have failed. (People *v.* Cady, 143 N. Y. 100; People *ex rel.* McShane *v.* Hagen, 48 App. Div. 203, affirmed 164 N. Y. 570.) The letter and spirit of the provision contemplate that the voter's presence in one place and absence from another is temporary in character and preserve his former residence, notwithstanding his absence therefrom. (Matter of Garvey, 147 N. Y. 117.) The mere intention to change his residence will not suffice. (Matter of Barry, 164 N. Y. 18.) The intention must exist, but must concur with and be manifested by resultant acts which are wholly independent and outside of the mere presence in the new district and should be very clear and convincing to overcome the natural presumption. (Matter of Goodman, 146 N. Y. 284.)

Military Service: The constitution also provides that, in time of war, no elector in the actual military service of the state or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from his election district. (Article 2, Sec. 1.)

ARTICLE V

REGISTRATION

The constitution, while authorizing the legislature to make laws "for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage and for the registration of voters," prescribes that such registration "shall be completed at least ten days before each election"; that it "shall not be required for town and village elections except by express provision of law"; and that, "in cities and villages having five thousand inhabitants or more, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters." (Article 2, Sec. 4.)

Registration Made a Felony: The provision directing the legislature to make laws for the registration of voters is obviously violated by a law, signed by the Governor in 1913, presumably by oversight, to the effect that "any person who shall make any application for registration, as required" by the provisions of law relating to registration, "shall be guilty of a felony." (Sec. 184, as amended by Laws of 1913, Chapter 587.)

Registration in Rural Communities: The provision requiring personal registration in cities and villages having five thousand inhabitants or more, and prohibiting personal registration, on the first day of registration, in rural communities outside such cities and villages, presents more serious difficulties. It has now been authoritatively construed, however, to mean that the legislature cannot enact laws requiring personal registration on the first day of registration in such rural communities, even as

to first voters and citizens who did not vote at the last election. "'Proper proofs' may be required by the legislature and, within the limits of reason, the nature of the proof is under its control, except that proof involving personal appearance cannot be required on the first day. Proof by affidavit, or by the testimony of a third person may be required by statute, but if the proof so required is furnished at the first meeting, to the satisfaction of the inspectors, the legislature can neither authorize nor require those officers to refuse to register without the personal appearance of the applicant. That is one thing that it is prohibited from doing." (Fraser *v.* Brown, 203 N. Y. 136.)

ARTICLE VI

SECRECY

The first constitution of the state (1777) directed the legislature as soon as might be possible after the termination of the Revolutionary War to pass an act for holding all elections by ballot (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99, 104) and the present constitution provides that "all elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved." (Article 2, Sec. 5.) Voting machines are lawful. (People *ex rel.* Deister *v.* Wintermute, *supra.*) Town officers may be elected, if the legislature so prescribes, by a show of hands. (People *ex rel.* Clancy *v.* Supervisors, 139 N. Y. 524, 528.)

ARTICLE VII

BIPARTISAN BOARDS

The constitution provides that "all laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties, respectively, as the legislature may direct." These provisions "do not apply to town meetings, or to village elections." (Article 2, Sec. 6.)

The reference to the highest and next highest votes cast is to votes cast in the state and not to votes cast in any particular locality. (Matter of Knollin, 59 Misc. 373, affirmed, on opinion of Andrews, J., below, 128 App. Div. 908, affirmed 196 N. Y. 526; Carmody, A.-G., A.-G. Rep. of 1913, 307, distinguishing People *ex rel.* Bonheur *v.* Christ, 208 N. Y. 6.)

ARTICLE VIII

PRIVATE OR LOCAL LAWS

The constitution provides that "the legislature shall not pass a private or local bill" "regulating the opening and conducting of elections or designating places of voting." (Article 3, Sec. 18.)

Legislation which imposes greater restrictions on voters in New York City than on voters in country districts does not necessarily violate this provision, and a law which requires voters in New York City, when registering, not only to answer a long list of questions, but also to sign their names, is constitutional. (Ahern *v.* Elder, 195 N. Y. 493.)

The constitution provides that "all elections of city officers including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year." This section does not apply to any city of the third class or to elections of any judicial officer, except judges and justices of inferior local courts. (Article 12, Sec. 3.)

ARTICLE IX

VACANCIES IN PUBLIC OFFICE

The constitution authorizes the legislature "to provide for filling vacancies in office," but provides that, "in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy." (Article 10, Sec. 5.) The prohibition of this provision, however, relates only to officers made elective by the constitution itself and where the legislature creates an office, it may constitutionally provide that a person

appointed to fill a vacancy therein may hold office beyond the commencement of the political year next succeeding the first annual election after the happening of the vacancy, and for the full balance of the term. If the legislature does so provide, an election to fill the vacancy at the first annual election after the happening thereof is unauthorized and void. (People *ex rel.* Hatfield *v.* Comstock, 78 N. Y. 356.) Similarly the words, "except to fill vacancies," contained in the provision of the constitution providing that certain municipal and other elections, except to fill vacancies, shall be held in odd-numbered years (Article 12, Sec. 3, *ante*, p. 25) are permissive and not mandatory and the legislature may constitutionally provide that a person appointed to fill a vacancy in an office created by it may hold office beyond an even-numbered year, until the first day of January after the next municipal election in an odd-numbered year. (People *ex rel.* Ward *v.* Scheu, 167 N. Y. 292.)

Part Second

THE ELECTION LAW

ARTICLE I

THE NEW YORK SYSTEM OF ELECTIONS

TITLE 1.—ELECTION LAWS

Elections: The election law (Sec. 1) deals with elections, first, general elections, at which all the voters choose and elect public officers from various candidates for election previously nominated by parties and independent bodies, and, second, primary elections, at which party voters choose and nominate party candidates from various candidates for nomination previously designated by party committees and party petitioners. Independent bodies nominate independent candidates by petition, not by primary election. Any system of elections also involves many other matters which the experience of time has ingrafted upon the exercise of the franchise, and, in New York State, the bewildering multitude of detail is responsible for the general ignorance of the fundamental principles of election law and the public heedlessness in respect to such reforms as are really needed. There cannot, however, be an election without an election law. Some authority is necessary. "A few voters putting tickets in a box do not alone make an election." (People *ex rel.* Woods *v.* Crissey, 91 N. Y. 616, 634.)

Election Law of 1842: In 1842, the legislature enacted

a general election law, entitled "An act respecting elections other than for militia and town officers." This law remained in force with some amendments and supplemental acts from 1842 to 1890. (Laws of 1842, Chap. 130.)

Ballot Reform Act of 1890: In 1890, the legislature enacted the so-called "Ballot Reform Act" (Laws of 1890, Chap. 262), which bore the significant title "An act to promote the independence of voters at public elections, enforce the secrecy of the ballot and provide for the printing and distribution of ballots at public expense." That act inaugurated the voting booth, prohibited electioneering within one hundred and fifty feet of the polling place, took the burden of printing and distributing ballots from the party organizations and placed it upon the public generally, and throughout "teemed" with provisions guarding against the frauds upon the ballot that experience had shown to be possible. (People *ex rel.* Coffey *v.* Democratic Committee, 164 N. Y. 335, 338–9.) Its primary object was to enable the voter to cast his ballot without the possibility of revealing, by the act of voting, the identity or political complexion of the candidates for whom he voted (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395), and it undoubtedly marked a long stride forward in the direction of election reform.

Acts of 1895 and 1896: Since the enactment of the Ballot Reform Act, the election law has been amended, in many respects, so as to guard against frauds at elections. In 1895, separate party ballots were replaced by a single official ballot (Laws of 1895, Chap. 810); but the ballot so created, while improving conditions over no official ballot at all, was the cumbersome blanket party-column ballot which is in use to-day. In 1896, the election law was rewritten by "an act in relation to the elections, constituting chapter six of the general laws." (Laws of 1896, Chap. 909.)

Party Organization Under Ballot Reform Act: The Ballot Reform Act of 1890 and the Election Law of 1896 did not concern themselves particularly with party organization and, for a number of years after their enactment, party committees, such as a county general committee, continued to be voluntary political associations. Membership on such a committee was a privilege which might be accorded or withheld by the majority members of the committee, who could refuse to recognize the choice of a given constituency until such time as the voters in that constituency should conclude to elect a delegate who would be agreeable to the wishes of the majority. (McKane *v.* Adams, 123 N. Y. 609.) Thus there arose a demand for a primary law sufficiently comprehensive to assure to all party voters equal rights at primary elections and conventions and on political committees.

Primary Laws of 1898-9: In 1898 and 1899, the legislature attempted to meet this further demand by the enactment of new primary laws. (Laws of 1898, Chap. 179, as amended by Laws of 1899, Chap. 473.) These new laws recognized, for the first time, that primary elections are, in many respects, as important as general elections and modeled the conduct of primary elections upon the conduct of general elections. They provided for the enrollment of the voter, and for voting booths, challengers and watchers and so on. The voluntary character of certain committees, such as the county committee, was destroyed and membership thereon became a matter of right by virtue of election thereto at a primary election, and the majority members of the committee became powerless to remove a duly elected member on any pretext whatever. (People *ex rel.* Coffey *v.* Democratic Committee, 164 N. Y. 335; People *ex rel.* Hahn *v.* Republican Committee, 124 App. Div. 427. Compare People *ex rel.* Garvey *v.* Democratic Committee, 175

N. Y. 415.) In other words, the new primary laws created a scheme which authorized voters to construct their party organization from the bottom upwards, instead of permitting leaders to construct it from the top downwards. (People *ex rel.* Coffey *v.* Democratic Committee, *supra.*) And the present law declares the articles dealing with enrollment, party organization, designations, primaries and conventions to be "controlling" on the method of enrolling the voters of a party; the organization and conduct of party committees; the method of electing members of party committees, and delegates and alternates to party conventions; the organization and conduct of party conventions; and the nomination by parties of candidates for offices. (Sec. 2.)

Consolidated Election Law of 1909: In 1909, the legislature consolidated the election law, the primary election law and other separate laws into a new election law. (Laws of 1909, Chap. 22.)

Levy Law of 1911: In 1911, the legislature enacted a law (Laws of 1911, Chap. 649), which contained many remedial features and two provisions which the courts subsequently held to be unconstitutional. This was known as the Levy law, and because of the criticism directed at one of the two unconstitutional provisions, the value of the remedial features has been generally ignored. This law will be considered further hereafter (*post,* pages 70, 81, 120–1, 125, 143).

Nominations Under Primary Acts of 1898–9: The system inaugurated by the primary laws of 1898–9, while another step in advance, by no means achieved perfection and, after a few years, a demand arose for further amendment. It was found, or asserted, that electing delegates at primary elections who, in turn, met at conventions and made nominations, was so indirect in its method that it gave undue power to the party leader or boss and the

demand was made that voters, at primaries, should be allowed to vote directly for party candidates, in other words, that there should be a system of direct primaries.

Direct Primary Law of 1911: In 1911, during the administration of Governor John A. Dix, the legislature attempted to meet this last demand, and it wrote a new article on party organization and completely changed the system of nomination at primary elections. (Laws of 1911, Chap. 891.) It abolished the convention system of nominating, except for candidates for office to be voted for by all the voters of the state, and substituted a statewide system of direct primaries operating both in rural communities and city districts. Congressmen, state senators, assemblymen, supervisors, mayors, justices of the supreme court and aldermen, all officers, in fact, except officers to be voted for by all the voters in the state, are now nominated directly at primaries. Chronologically, the order of events in nominating these officers used to be:

1. Primaries, to elect delegates to nominating conventions;

2. Conventions, which nominated party candidates and elected delegates to state conventions.

Now the order is:

1. Designations, by party committees, of candidates for party nominations and for election to party positions, "party positions" consisting of membership on committees and the position of delegate or alternate. (Sec. 3, definition 12.) These are the "machine" designations.

2. Other designations, by party petitions, of opposing candidates for party nominations and for election to party positions. These are the "anti-machine" designations.

3. Primary election to nominate, by direct election, the party's candidates and to elect its committees, delegates and alternates.

Direct Primaries: The main point of divergence between

direct primaries and the convention system which preceded them is that they afford party voters an *opportunity* to have a real voice in nominating party candidates, instead of being relegated to a choice on election day, between what may be unworthy party candidates, who, however, advocate party principles, and more worthy candidates of another party, advocating principles of such other party with which the voter is not in sympathy. Under the convention system, the voters acted first, then left everything to others, while under direct primaries the voters act last—that is, have the final say, after all the cards are faced on the table. Under the convention system, the voter gained nothing by attending primaries, because he did not and could not know what candidates the delegates for whom he voted would thereafter nominate. The delegates themselves would not know until after the primaries, and even then a majority of them were usually "organization men," prepared to nominate any candidate whom the party leader or party boss might suggest. Under direct primaries, this condition is changed, because the voter, at the primary, votes not indirectly for delegates to nominating conventions, but directly for the candidates whom he himself desires for his party's candidates. Moreover, he may also exercise a choice as to the committees for the ensuing year and, if he and his fellow workers are in the majority, can take over the local party machinery themselves. The suggestion that direct primaries are useless because the ordinary voter is too busy earning his living to waste time at primaries overlooks the fact that, if the voter desires to take upon himself the duties of citizenship, he has the opportunity of doing something by going to a primary election and voting directly for the candidates he desires his party to nominate, whereas he gained nothing by voting at primaries under the convention system.

Primary Bills at the Session of 1913.

The session of 1913 was marked by a controversy between the legislature and the Governor respecting two election bills, one introduced by Senator Blauvelt and known as the "Blauvelt bill" or "*long* Blauvelt bill," and the other introduced at the instance of the Governor and a committee of eminent citizens and known as the "Sulzer bill." At the regular session, and again at extra session called to consider amendments to the election law, the legislature passed the Blauvelt bill and defeated the Sulzer bill; and the Governor, in turn, twice vetoed the Blauvelt bill. While the controversy was waged over "direct primaries," neither bill was confined to that subject; on the contrary, both bills were lengthy documents, seeking to amend nearly every chapter of the election law. The Blauvelt bill made radical reduction in the expense of elections, provided for a somewhat shorter ballot at primary elections, increased from five to ten days the period of opportunity during which party men may make anti-machine designations, after the machine, through party designating committees, has acted (*post*, p. 62); and met decisions of the court of appeals by making suitable provision for registration in rural communities and guarding against fraud thereat (*post*, p. 76), and by placing the required number of signatures to independent certificates of nomination on a percentage basis, instead of employing arbitrary figures. The Blauvelt bill, concededly, contained no vicious or unwise provision, and was remedial legislation of a good sort. It was vetoed because, in the Governor's opinion, it did not go far enough in respect to *primary* reform. In this respect, he charged it to be "a fraud and a makeshift." Curiously enough, the majority of the provisions of the two bills were identical, the Sulzer bill being largely copied verbatim from the Blauvelt bill. At the point of divergence, however, the Sulzer bill, in-

stead of adopting the provision increasing the period of opportunity during which party men may make anti-machine designations after the machine through party designating committees has acted, abolished committee designations, substituted designating *petitions* without distinguishing between machine and anti-machine designations and *struck from the law even the five-day period of opportunity.* It thus invited the machine to file its designating petitions at the sixtieth minute of the last hour; and deprived anti-machine groups *of any opportunity whatever* of making intelligent opposition. The Sulzer bill also contained various drastic amendments, such as the abolition of the state convention (*post,* p. 58), and the striking of *all* emblems from the primary ballot; and it repealed two of the most important safeguards to independent nominations, enacted in 1911 and approved by the Court of Appeals (*post,* p. 70).

Blauvelt-Van Woert Act of 1913.

Late in the session of 1913 (August 13, 1913), the legislature passed, over the Governor's veto, the "Blauvelt-Van Woert," or "*short*" Blauvelt bill. (Laws of 1913, Chap. 800). This act accomplished several of the reforms sought to be accomplished by the "long" Blauvelt bill. It made reductions in the expense of elections, provided for a somewhat shorter ballot at primary elections (*post,* p. 63) and placed the required number of signatures to independent certificates of nomination on a percentage basis, instead of employing arbitrary figures, as heretofore (*post,* p. 72).

TITLE 2.—FUNDAMENTAL DISTINCTIONS

Parties: In the upbuilding of the election law, the element of parties, party organization and party nominations has become more fully recognized with each year's

amendments. There are reformers who assert that New York can never have a simple election law until the distinction between party nominations and independent nominations is abolished *and all nominations are made by petition.* Such a program would undoubtedly strike from the election law the voluminous detail of provisions respecting party nominations, enrollment, party conventions, party committees, primary elections and the like, but, whatever its merit, it would mark progress in precisely the opposite direction from that which has been taken by election reform in the past, which is characterized by the enactment and perfection of laws regulating parties and party nominations and making enrollment, party membership and party organization a matter of law rather than privilege.

Elections Distinguished: It has already been pointed out that all the voters vote at general elections, where they elect public officers from various candidates for election previously nominated by party and independent nominations, whereas only party voters vote at primary elections (democrats at democratic primaries, republicans at republican primaries, and so on) and, instead of electing, merely *nominate*, party candidates and instead of making their choice from nominees, make it from *designees*,* that is from candidates for nomination previously *designated* by party committees and party petitioners.

Independent Nominations and Designations by Petition: Independent nominations and designations by petition are usually confused, probably because both are made by petition and represent independent or anti-machine action; but they are absolutely distinct and have nothing whatever in common. All designations, both committee designations (which are the machine designations) and

* NOTE. The word "designees" is novel and does not appear in the election law. It is justified, however, as being needed.

designations by petition (which are the anti-machine designations) are exclusively *party* designations. *There is no such thing as an independent designation.* No one except enrolled party voters can participate in any designation, and *a designation is merely a preliminary step in the making of a party nomination.* When each party makes all its designations, it holds its primary election and selects, by a vote of its party voters, its candidates for nomination. In other words, a primary election is a *first* or *primary* election held to choose party candidates for a coming general election. Independent nominations, however, have nothing to do with parties. They are made independently of party machinery. When each party has completed all its nominations, whether by state convention or by direct primary, the law provides for nominations by voters by petition independently of parties, and it is these nominations which are independent nominations.

Election Reform: Before commencing a detailed examination of the provisions of the election law, there is still one other thought to be borne in mind. While election reform has been directed partly to general elections and partly to primary elections, it should be constantly borne in mind, in order to keep the proper perspective, that the important election is the general election, because all the machinery of any system of elections culminates when each voter casts his single vote at the general election. It consequently follows that the most important reforms must be reforms which will tend to produce the greatest simplicity in voting at general elections and afford the greatest opportunity to vote intelligently at general elections. If such reforms as the "short ballot" or the "Massachusetts ballot" have the merit which is asserted for them by their advocates, they must obviously be of greater importance than any reform tending to produce simplicity in voting at primaries and increasing the

opportunity to vote intelligently at primaries, because, after all, primaries are only a preliminary election, and general elections would continue even if primaries, direct and indirect, were forever abolished.

The present condition of the law, with considerable of its detail and proposed reforms, will be considered hereafter.

ARTICLE II

ENROLLMENT OF VOTERS

TITLE 1.—IN GENERAL

Parties: The election law defines the term "party" to mean any political organization which at the last preceding election for governor polled at least ten thousand votes for any candidate for any office nominated by it to be voted for by all the electors of the state (Sec. 3, subd. 8) and recognizes in the fullest way the existence of parties as political organizations with enrolled memberships and officers and committees chosen by and from the members. Parties are not close corporations selecting their own members, but any voter is entitled to become an enrolled member of any party and to participate in its government providing he complies with the statutory tests, which consist only of his own declaration as to his political sympathies and intentions. A voter may enroll with one party one year and another party the succeeding year (Matter of Duffy, 125 App. Div. 406), provided that, in such succeeding year, he has not participated in any primary election or convention (Sec. 7).

Enrollment Optional: Enrollment, being a party function, is not mandatory, but optional with the voter (Sec. 10). No person can be required to enroll, nor does

his failure to do so affect his right to register for the purpose of voting at any election, except a primary election (Sec. 21). Only enrolled voters are entitled to participate in the official primary elections of their respective parties. No voter can take part in any primary election of any party other than the party in which he shall at the time be enrolled. No voter who has once enrolled in a political party is permitted to enroll in another political party before the first day of the next registration (Sec. 19).

TITLE 2.—PARAPHERNALIA

The custodian of primary records, that is, the board of elections (Sec. 202), whose duty it is to provide official ballots for general elections (Sec. 3, subdiv. 7), must furnish the paraphernalia of enrollment, which include enrollment books (Secs. 4–5), election booths and the same articles as are required by law to be placed in voting booths for a general election, enrollment boxes (Sec. 6) and also enrollment blanks, with envelopes (Sec. 7).

TITLE 3.—MANNER OF ENROLLMENT

A voter, who chooses to enroll, enrolls in one year for the succeeding calendar year, commencing on the first day of January following enrollment. Such enrollment remains in force one year (Sec. 18). If he presents himself personally for registration on a registration day, he enrolls on such registration day, after registering (Sec. 8). Where personal registration is not required and he has not registered personally, he enrolls on election day, after voting (Sec. 9). A voter enrolls by entering a booth and making a cross mark in a circle under the party emblem of the party of his selection, upon the enrollment blank provided for that purpose, on which is printed a statement that the

voter solemnly declares, among other things, that he is "in general sympathy with the principles of the party" designated and that it is his "intention to support generally at the next general election, state or national, the nominees of such party for state or national offices" and that he has not enrolled with or participated in any primary election or convention of any other party since the first day of the preceding January (Sec. 7). The law contains a provision that the voter use a pencil having black lead (Sec. 10), but this is directory only. (Matter of Kirk, 66 Misc. 535.) The voter encloses the enrollment blank in the envelope, seals the envelope and deposits it in the enrollment box (Sec. 10). The inspectors write the voter's number and residence in the enrollment book (Secs. 8–9) and indicate that the voter has enrolled by placing the word "yes" after his name (Sec. 10).

TITLE 4.—CANVASS OF ENROLLMENT

The enrollment books are sealed in envelopes and they and the boxes are returned to the custodian of primary records, who keeps them unopened until the Tuesday after election day (Secs. 12, 13). The envelopes are then opened and enrollment is completed by the custodian by entering against the various voters' names in the enrollment books, the name of the party with which each has enrolled (Sec. 14).

TITLE 5.—ENROLLMENT FOR A NEW POLITICAL PARTY

In 1913, the legislature, at the instance of the national progressive party, which became a party at the election of 1912, passed a law providing for the enrollment of a new political party (Secs. 15, 22, 55, as amended by Laws of 1913, Chap. 587).

TITLE 6.—ENROLLMENT BOOKS

Original Books: The original enrollment books are used at official primary elections (Sec. 18). They are public records, except for the period during which they are sealed (Sec. 21).

Duplicate Books: The custodian of primary records must annually provide for each party and deliver to the chairman of its proper general committee a true copy of so much of the enrollment books as will give the name, address and political affiliation of each voter (Sec. 16).

ARTICLE III

PARTY ORGANIZATION

TITLE 1.—STATE CONVENTION AND PARTY COMMITTEES

Direct Primary Law of 1911: The Direct Primary Act of 1911 (Laws of 1911, Chap. 891) abolished all conventions except the state convention. It defined the term "committee" to mean any committee chosen to represent the members of a party in any political subdivision of the state (Sec. 3, definition 14) and legalized many new stated party committees, expressly providing that party committees are to consist of a state committee, judicial, congressional, senatorial, assembly, aldermanic and municipal court district committees and county, city and borough committees, and also such other committees as may be provided for by the rules and regulations of the party desiring such additional committees (Sec. 35), and that every party committee may appoint such subcommittees, executive and campaign committees, as it deems proper (Secs. 35, 38).

Organization. Rules and Regulations: Every party committee, including the state committee, must organize

within ten days after its election. Each committee may, and each state and county committee must, prepare and file rules and regulations for the government of the party and the conduct of the official primaries within its political subdivision, which may include the payment of dues (Sec. 38).

State Committee:* The state committee consists of such number, and elected, in even-numbered years, from such units of representation (unit-areas), as the respective parties shall provide by rules and regulations adopted at a state convention at which state officers are nominated. Each member of the state committee must be an enrolled voter of the party within the "unit of representation," that is, the unit-area, which he has been elected to represent, and holds office until his successor is elected. In presidential years, the state committee is elected at the spring primary. The state committee is authorized to designate the time and place of holding the state convention, and to fill vacancies upon the state ticket and in its own membership (Sec. 36).

Other Committees: Members of all committees must be elected at direct primaries. Membership in committees is interlacing. Members of the county committee consist of such number, and elected from such units of representation, that is, unit-areas, as the rules and regulations of the party may provide, except that the number of members from any unit shall be not less than the number of election districts within such unit. Where a judicial, senatorial, congressional, assembly, aldermanic or municipal court district, or a city, or a borough, is co-terminous with, or less than, the limits of, but wholly within, an entire county, the members of the county committee from the various districts, respectively, shall constitute the local committees,

* NOTE. As this book goes to press, a bill affecting the state committee passed by the senate over the Governor's veto, is pending in the assembly.

unless otherwise provided for by the rules of the party. "If a judicial, congressional or senatorial district consist of more than one county, the judicial, congressional or senatorial district committee shall be composed of three members from each assembly district and each portion of an assembly district comprised within such judicial, congressional or senatorial district, and each such assembly district or portion of an assembly district shall be entitled to at least one vote in such committee, and if the votes cast in such assembly district, or portion thereof, for the candidate of the party, for governor, at the preceding election, exceeded one thousand, to an additional vote for each one thousand votes, or major portion thereof, and each member elected from an assembly district, or portion thereof, shall be entitled to at least one-third of the total vote of such assembly district or portion thereof." Where a city consists of more than one county, the city committee shall consist of such number of members, elected from such units of representation as the rules and regulations of the party may provide (Sec. 37).

Ballots: Inasmuch as members of a county committee become *ipso facto* members of the various local committees, a single appearance of the names on the ballot is ordinarily sufficient and, when elected, their membership on the other committees attaches without further action. (Koenig *v.* Britt, 149 App. Div. 68, affirmed 204 N. Y. 681.)

Removal: A member of a party committee may be removed by such committee for disloyalty to the party or corruption in office, after notice and a hearing upon written charges (Sec. 40).

TITLE 2.—UNIT-AREA OF REPRESENTATION

Subdivisions of the State: The state of New York is variously divided into civil and political divisions as

follows: (1) Counties, containing one or more assembly districts. (2) Congressional districts. (3) Senate districts, also containing assembly districts. (4) Cities and towns. (Revised statutes, chap. 2, and acts supplemental thereto and amendatory thereof. *Not* consolidated.)

Election District: Every town and every ward of a city not subdivided into election districts constitutes itself an election district. The town boards of towns containing more than four hundred voters, the common council of every city, except New York City and Buffalo, in which there is a ward containing more than four hundred voters, and the boards of elections of New York City and Buffalo, have jurisdiction, although a limited jurisdiction, to divide such towns and cities into election districts. Assembly districts are created by the legislature and are permanent in character. Election districts are created by local bodies and are transitory in character, varying according to variation in population (Sec. 296).

Unit of Representation: The election law defines the term "unit of representation" to mean any election district, town, ward of a city, assembly district or any other political subdivision of the state which is the unit from which members of any political committee or delegates to a party convention shall be elected (Sec. 3, definition 6). It is a unit-area. The law, in general, leaves the selection of units, both for election to membership on committees and as delegates to conventions, to be determined by the rules and regulations of the respective parties (Secs. 36, 37, 111).

Scope of Selection: Parties have been held to be entitled to choose any district specified in the law, although, in a case where such district contains several smaller districts, the selection thereof would permit voters to participate in the nomination of candidates at primaries for whom they would not be qualified to vote at election. (Matter

of Sheridan, 57 Misc. 42.) It is true that the contrary has also been held (Matter of Murphy, 126 App. Div. 58), but the court, in the latter case, based its decision on a provision of the law that no person could vote at a primary unless entitled to vote at election for the officers nominated at the primary (Laws of 1909, Chap. 22, Sec. 5), and that provision has since been repealed (Laws of 1911, Chap. 891, Sec. 65).

Units Actually Chosen: The various parties have differed in their choice of the various units for the various offices. For instance, the democratic party has selected the senate district as the unit for delegates to the national convention and the republican party has selected the congressional district. Similarly, in New York County, the democratic party has selected the assembly district as the unit for membership on the county committee (Rules, Article II; Matter of Sheridan, 57 Misc. 42), while the republican party has recently adopted a rule providing that membership on county committee shall consist of one member for each fifty votes cast for the republican candidate for governor at the last general election within each election district (Rules, Article III), and the national progressive party provides that at least one member shall be elected by the enrolled voters of each election district, but also makes provision for members at large (Rules, Article III).

Mandatory Units: The suggestion has been made that the legislature should take the selection of the various units from the various parties and substitute mandatory provisions on the subject, particularly a provision making the election district the unit in cities. The difficulty about such provision, however, is that conditions differ in rural communities and congested districts and while one or more of the parties may see fit to choose the election district as the unit where its boundaries are the same as the natural and permanent boundaries of a town, many

regard it as inadvisable to compel its adoption in cities, where the assembly district, which has greater permanence, is the more logical unit. There is no crying need for a mandatory unit in any case.

TITLE 3.—DETERMINATIONS BY PARTY AUTHORITIES

At one stage in the history of the election law a determination of a state convention or state committee was regarded by the courts as conclusive and not subject to review. (Matter of Fairchild, 151 N. Y. 359.) Under the present law, whenever contending factions each claim the same name or emblem or the right to designate election officers, preference must be given to the faction recognized by the regularly constituted party authorities (Secs. 125, 304); and in reviewing questions relating to nominations the courts must consider, but need not be controlled by, any action or determination of the regularly constituted party authorities. (Sec. 56; Matter of Heacock, 18 Misc. 311.)

ARTICLE IV

NOMINATIONS, IN GENERAL

TITLE 1.—DEFINITIONS

Nominations: The election law defines the term "nomination" to mean the selection of a candidate for office authorized to be filled at a general election, or a special election held to fill a vacancy in such office (Sec. 3, definition 9). Nominations are of two classes, party nominations (Sec. 121), defined as the selection of a candidate by a party (Sec. 3, definition 16), and independent nomina-

tions (Sec. 122), defined as the selection of a candidate by an independent body (Sec. 3, definition 17).

Candidates or Nominees: Candidates or nominees are of the same two classes, party candidates or nominees (Sec. 3, definition 18) and independent candidates or nominees (Sec. 3, definition 19).

TITLE 2.—CERTIFICATES OF NOMINATION

The law provides for certificates of nomination, party certificates of nomination (Sec. 121) or independent certificates of nomination (Sec. 123).

Name: Each certificate must designate, in not more than five words, the name of the party or independent body making the nomination (Secs. 121, 123). The name selected by an independent certificate must not include the name of any organized political party (Sec. 123).

Place: The place of filing certificates of nominations depends on the office to be filled. Sometimes they are filed with the secretary of state, more often with the appropriate board of elections and, in some cases, with the clerk of a city, village or town. All filed certificates are public records and the officer or board must also keep a public book recording all certificates, objections and declinations filed with it or him (Sec. 127).

Time: The time of filing depends both on the class of nomination and on the office to be filled or place of filing, as follows:

Party nominations, if filed with the secretary of state, must be filed between 30 and 40 days before election;

Party nominations, if filed with a board of elections, must be filed between 25 and 35 days before election;

Party nominations, if filed with a board of elections and a town clerk, must be filed between 25 and 35 days before election;

Party nominations, if filed with a town or village clerk, must be filed between 15 and 20 days before election;

Independent nominations must be filed between the same commencement dates, respectively, and 5 days *after* the last dates, respectively, on which party nominations for the same office are required to be filed;

In the case of a special election to fill a vacancy in an elective office, all certificates must be filed not less than 10 days before such special election (Sec. 128).

These requirements as to time are mandatory, but the courts may grant relief, in the absence of negligence or fault, from accident or mistake. (Matter of Darling, 189 N. Y. 570, overruling Matter of Cuddeback, 3 App. Div. 103. So also People *ex rel.* Simmons *v.* Ham, 56 Misc. 112; Matter of Bayne, 69 Misc. 579; distinguished, Matter of Swarthout, 76 Misc. 24.)

Last Day a Sunday: The last day to file party certificates of nominations with the secretary of state invariably falls on a Sunday. A strict construction of the statute would require such certificates to be filed on the preceding Saturday and the Attorney-General has so ruled. (Carmody, A.-G., A.-G. Rep. of 1911, p. 647.) Where, however, the secretary of state has fixed Monday on the election calendar he is required to make, certificates must be accepted on that day. (Matter of Bayne, *supra.*)

Hour: A certificate may be delivered to the proper officer, wherever he is, up to midnight of the last day. (Matter of Norton, 34 App. Div. 79, appeal dismissed 158 N. Y. 130; Carmody, A.-G., 2 Opinions of 1911, 647.)

TITLE 3.—SELECTION OF EMBLEMS FOR GENERAL ELECTIONS

Emblems: The election law provides for emblems, both for parties and for independent bodies, for the official primary ballot at primary elections and for the official ballot at general elections. "The emblem is required that the illiterate voter may be secure in his choice." (Matter of Greene, 9 App. Div. 223, affirmed 150 N. Y. 566.) They "are necessary at primaries the same as at general elections, so as to enable the voter to avoid mistakes and vote intelligently." (Hopper *v.* Britt, 204 N. Y. 524, 528.) The various questions relating to emblems for the official ballot at general elections will be considered at this point. The use of emblems on the primary ballot will be considered hereafter in connection with the official primary ballot (*post*, p. 64).

The state convention selects the party emblem to designate the candidates of the party and files a certificate showing a representation thereof with the secretary of state. Such emblem, when so filed, shall in no case be used by any other party or independent body. In the case where an independent body nominates, the signatories select their emblem, which must be shown by a representation thereof upon the certificate of nomination. An emblem, when filed, shall be used to designate and distinguish all the candidates of the same political party or independent body in all districts of the state and shall continue to be used to designate and distinguish the candidates of such political party or independent body in all districts of the state until changed by the state convention of the political party or independent body choosing it. An emblem may be any appropriate symbol, except the coat of arms or seal of any state or of the United States, the state or national flag, a religious emblem or symbol, the

portrait of any person, the representation of a coin or of the currency of the United States (Sec. 124).

Supplying Omitted Emblems: Where the party or independent body fails to select an emblem or, having selected an emblem, is adjudged not to be entitled thereto and thereupon presents no other device, the duty of selecting an emblem devolves on the officer with whom the certificate is filed (Secs. 125–126).

TITLE 4.—CONFLICT IN NAMES OR EMBLEMS AT GENERAL ELECTIONS

Conflicts Between Parties: If the certificates of nomination of two or more different parties or independent bodies designate substantially the same name or emblem, the courts are authorized to decide which is entitled to the use thereof, being governed, so far as may be, by priority of use in the case of a name and by priority of designation in the case of an emblem.

Conflicts Between Factions: If two or more factions of the same party, including two conventions (People *ex rel.* Ward *v.* Roosevelt, 151 N. Y. 369), claim substantially the same name or emblem, the courts must decide between such conflicting claims, giving preference of name and device to the faction recognized by the regularly constituted party authorities (Sec. 125).

Contests Where Bona Fide Opponents Seek to Appropriate Name: During the presidential election of 1896, when the gold democrats at their national convention had adopted the name "National Democratic Party" and nominated presidential electors throughout the country, the courts sustained the New York certificate of nomination adopting that name (Matter of Greene, 9 App. Div. 223, affirmed without opinion, 150 N. Y. 566); but they have since refused to permit independent bodies to take

the name of "Social Democratic Party" (Matter of Social Democratic Party, 182 N. Y. 442), or "Independent Democratic Party" (Matter of Carr, 94 App. Div. 493) or "Independent Republican Party" (Matter of Smith, 41 Misc. 501) or "Independent Progressive Party." (Matter of Kaufman, 152 App. Div. 940.)

Contests Where Mala Fide Adherents Seek to Appropriate Name or Emblem: There are also other decisions arising out of the attempt of individuals in some particular locality to appropriate for their local candidates the name and emblem of some independent body, such as the Independence League, Civic Alliance, National Progressive or Square Deal Party, which, at the time, is showing signs of becoming an important factor in an approaching general election. In these cases, the claimants to the name and emblem base their claim not in derogation of the right of the central body, but by virtue of it. They assert that they are part and parcel of it. The election law lays down two tests affecting these claims, identity and priority, that is, identity of a claimant or conflicting claimants with the central independent body, and priority between conflicting claimants in the time of filing their nominating certificates. Ordinarily, between conflicting claimants, the certificate first filed under the name and emblem would be entitled to preference; but this is subject to the proviso that it must be filed by the same independent body as the central body, which is usually a question of fact. (Matter of Independent Nominations, 186 N. Y. 266.) In determining this question of fact, the courts have held that, when there is a contest between two bodies, evidenced by two certificates, it is a question of relative good faith between the candidates nominated to fill up the ticket, that is which ones are in sympathy with the general movement; and that the preferences of the committee in charge of the general ticket should have great weight in determin-

ing who shall be placed on its ticket. To hold that a certificate first filed, especially a certificate nominating persons who are already candidates of another party which is in opposition to the general ticket on which they desire to be placed, must be adopted merely because it was first filed, would violate the spirit of the election law. (Matter of Quimby, 116 App. Div. 142, affirmed on the ground that the question of fact had been decided by the lower courts, Matter of Independent Nominations, 186 N. Y. 266; Matter of Folks, 134 App. Div. 376, affirmed 196 N. Y. 540; Matter of Commissioner of Elections, 64 Misc. 620.) When there is no contest between different certificates, however, and the court is not called upon to pass upon conflicting claims of candidates nominated by two sets of nominators, the courts have held that they are powerless to interfere, unless some reason is made to appear why the name and emblem should not be used, or that some other body or party has a prior right to the use thereof. (Matter of Wechsler, 134 App. Div. 378.) In a very recent case, where there was but a single certificate of nomination, the court of appeals held that the fact that the signers of a certificate of nomination selected the same name and emblem as that of an independent body created a presumption that they must be members of that body and that evidence that all the regularly constituted authorities of the independent body had decided that no such nomination should be made in that district did not rebut it. (Matter of O'Brien, 206 N. Y. 694, affirming 152 App. Div. 856.) This decision was decided by a bare majority in both courts. In the court of appeals, Cullen, C. J., wrote a strong dissenting opinion in which Vann and Werner, JJ., concurred, expressing a number of cogent arguments against the existence of any such presumption.

TITLE 5.—DECLINATIONS

Nominations may be declined, but only within certain stated periods. Since 1911, most nominations are made by primary elections (direct primaries) and in such cases, declination is ordinarily made not of the nomination but of the designation and must be made within five days after the third Tuesday preceding the primary election, that is, sixteen days before the election (Sec. 50). The attorney-general has ruled that a candidate may also decline a nomination made at a primary election and that, in such case, the designating committee fills the vacancy (Sec. 90; Carmody, A.-G., A.-G. Rep. of 1912, p. 475). Nominations must be declined at times varying between twenty-five days before election, in the case where a party nomination is filed with the secretary of state, to seven days before election in the case where an independent nomination is filed with a village clerk. Where a person declines within the stated time, his name shall not be printed on the official ballot (Sec. 133). Declinations are public records (Sec. 127).

TITLE 6.—OBJECTIONS

The law provides for objections to certificates of nomination. They must ordinarily be filed within three days after the filing of the certificate. Where objections are filed, notice must be given forthwith by mail to the committee, if any, appointed on the face of such certificate to fill vacancies, and also to each candidate placed in nomination by such certificate, and the question raised by the objection shall be heard and determined in the manner prescribed for deciding questions arising as to names or emblems (Sec. 134; *post*, p. 142). Objections are public records (Sec. 127). If no objections are filed within the statutory time, the candidates named in the certificate

must be recognized. (Matter of Cowie, 11 Supp. 838, Ingraham, J.)

TITLE 7.—VACANCIES IN NOMINATIONS

Vacancies in Primary Nominations: A vacancy in a nomination made at a primary election, occurring after such election, may be filled only by the party committee authorized to make the designation (Sec. 90; Carmody, A.-G., A.-G. Rep. of 1912, p. 475).

Vacancies in Other Nominations: The power to fill vacancies in nominations not made at primary elections is placed in a committee appointed on the face of the certificate (Secs 121, 123, 135). Two out of three members of the committee may act (Sec. 136; Kirk *v.* Gallagher, 146 App. Div. 685). The committee files a new certificate (Sec. 136), but retains the same emblem (Sec. 135). There are certain time limits, except in case of the death of a candidate after printing of the official ballots, when the vacancy may be still filled by filing the proper certificate of nomination; but in that case the custodian of primary records must prepare and furnish to the inspectors, and the ballot clerks must affix in the proper place and in a proper manner upon each official ballot before delivery to a voter, a paster bearing the new candidate's name (Secs. 136–137).

TITLE 8.—RECORD OF NOMINATIONS, OBJECTIONS AND DECLINATIONS

All filed certificates and corrected certificates of nomination, all objections to such certificates and all declinations of nomination are public records. It is the duty of every officer or board to exhibit, without delay, every such paper to any person who shall request to see the same.

It is also the duty of each such officer or board to keep a book which shall be open to public inspection, correctly recording the names of candidates, the titles of the offices, the names and emblems of the parties or independent bodies making the nomination, and in which shall also be stated all declinations and objections and the time of filing each of the said papers (Sec. 127).

TITLE 9.—PRINTING THE BALLOT

The secretary of state, fourteen days before election, certifies to the various boards of elections the candidates nominated by certificates filed with him or to whom he has issued certificates (Sec. 129) and the various boards provide the official ballots (Sec. 341). The sole guide to the boards of elections in preparing the ballot must be the certificate of the secretary of state, the certificates of nomination filed with it and its records showing the nomination of party candidates at primaries. (Matter of Madden, 148 N. Y. 136; People *ex rel.* Hirsh *v.* Wood, 148 N. Y. 142.) If a party entitled to a column on the ballot makes no nomination, the board need not print the column at all. (Matter of Myers, 140 App. Div. 22.) An honest mistake or some slight omission in printing the ballots does not invalidate an election. (People *ex rel.* Hirsh *v.* Wood, *supra;* People *ex rel.* Williams *v.* Board of Canvassers, 183 N. Y. 538, affirming 105 App. Div. 197, on opinion of Chester, J., below; Matter of Merow, 112 App. Div. 562; Matter of Hirsh, 14 Misc. 377; People *ex rel.* Hayes *v.* Edwards, 42 Misc. 567.) The use of lighter paper than that prescribed does not render the ballots cast void. (People *ex rel.* Abrams *v.* Voorhis, 45 Misc. 104.) If ballots are printed, however, so that votes thereon are no longer secret, such votes are void. (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395.)

No Nomination: If an office is to be filled for which no nominations are made, the name of the office should be printed on the ballot. Even if it is not so printed, there is authority justifying a voter in writing in both the name of the office and his candidate therefor. (People *ex rel.* Goring *v.* President, 144 N. Y. 616.)

ARTICLE V

NOMINATIONS BY PARTIES

TITLE 1.—METHODS OF NOMINATION

In General: The Direct Primary Act of 1911 (Chap. 891) while preserving the state convention as the body to make party nominations for officers to be voted for by all the voters of the state (Sec. 45, subdiv. 2), abolished all other nominating conventions and provided that virtually all other party candidates should be nominated at primary elections (Sec. 45, subdivs. 1 and 4). There are, however, one or two exceptions.

State Offices, Under Special Circumstances: In certain cases where it is impracticable for a state convention to act, such as for vacancies in a state office in an odd-numbered year, party nominations for an office to be voted for by all the voters of the state may be made by the state committee, unless otherwise provided for by the rules and regulations made by the state convention (Sec. 45, subdiv. 3).

Presidential Electors: The state committee also nominates candidates for presidential electors, one for each congressional district, and two at large (Sec. 54).

Town, Ward and Village Officers. School Director: Party nominations for town, ward and village offices and for

the office of school director are made in the manner prescribed by the rules to be adopted by the party committee of the county wherein such town, village or school district is located, and by the city committee where such ward is located (Sec. 45, subdiv. 4).

Special Elections: Party nominations for an office to be voted for at a special election shall be made in the manner prescribed by the rules and regulations of the respective parties (Sec. 45, subdiv. 5).

TITLE 2.—PARTY CERTIFICATES OF NOMINATION

The records in the office of the custodian of primary records or secretary of state, showing the nomination of a party candidate for an office at an official primary shall be equivalent to a certificate of nomination. The certificate whereby party nominations made by a convention are certified must contain the title of the office for which each person is nominated and the name and residence of each such person. When the nomination is made by a committee, the certificate of nomination must also contain a copy of the resolution passed at the convention or primary which authorized such committee to make such nomination. A certificate of nomination may appoint a committee of one or more persons to fill vacancies (Sec. 121).

TITLE 3.—NATIONAL AND STATE CONVENTIONS

Convention Defined: The election law defines the term "convention" to mean an assemblage of delegates representing a political party, duly convened for the purpose of nominating candidates for public offices, electing delegates to other conventions, electing officers for party organizations, or for the transaction of any other business relating to the affairs or conduct of the party (Sec. 3, definition 13).

Delegates and Alternates to National Conventions: Delegates and alternates to a national convention are elected either at the state convention held by a party or from congressional districts, or partly by state convention and partly from congressional districts, according to the rules and regulations of each political party (Sec. 53).

Delegates to State Conventions: Delegates and alternates to state conventions are elected at official primaries (Sec. 111, subdiv. 2). A person is not eligible for the position of delegate unless he is an enrolled voter of the party within the county containing the unit-area from which such position is to be filled (Sec. 45). The delegates to a convention certified or adjudicated to have been elected as such in the manner provided by law are conclusively entitled to their seats, rights and votes as delegates to such convention (Sec. 113). Vacancies may be filled by the delegates present from the same unit of representation (Sec. 110).

Fraud in Election of Delegates: The fact that there are errors or omissions in party proceedings preliminary to nomination, such, for instance, as fraud in the seating of certain delegates to a convention, does not impair the certificate of nomination. This necessarily must be so, or else no nomination would be of any use. (Matter of Cragg, 121 App. Div. 921; Matter of Lazarus, 140 App. Div. 406; Matter of Orgel, 140 App. Div. 410.)

Time and Place: The state committee of each party has power and authority to designate the time and place of holding the state convention (Sec. 36). The time cannot be earlier than seven days after the primary election at which the delegates were elected (Sec. 113).

Organization: The law provides fully for the organization of conventions (Sec. 112).

Voting: In voting for the nomination of candidates for public office or the election of delegates or committeemen,

delegates vote singly, except that the chairman of a delegation, unless a member of such delegation objects, may announce the vote of his delegation (Sec. 114).

Adjournment: After a convention has made its nomination or nominations and adjourns, it is *functus officio* and, upon the declination of nomination by a nominee, cannot reassemble and make a new nomination, which can only be made by the committee required by law to fill vacancies. (Matter of Greene, 121 App. Div. 693.)

State Convention. Its Function and Usefulness: Aside from the national convention, the only surviving convention in New York is the state convention. This convention has an important function in party government and the framing of party policies. The great area of the state of New York and its large and complex population are persuasive arguments in favor of the policy of having party delegates from all parts of the state meet together in convention once every two years, extend their acquaintance with one another, consult together and adopt platforms or declarations of party principles upon which they can all unite. Moreover, inasmuch as the system of direct primaries concededly reaches its highest efficiency in smaller localities, where the voter is comparatively familiar with the candidates whom he desires his party to place in nomination, and inasmuch as direct primaries lose much of their usefulness in greater localities, where most of the voters have only limited knowledge and meagre information respecting candidates for office, it would seem to follow that a convention of delegates, who themselves are elected at state-wide direct primaries, is not only consistent with our system of representative government, but more efficient to intelligently perform the work of selecting a state ticket. It is the logical body to nominate candidates to be voted for by all the voters of the state. Moreover, it must be borne in mind that if the

state convention were abolished, the expense which a contest for a nomination would impose on all state officers, including judges of the court of appeals, would be very great. Every candidate for party nomination would require an organization in every county of the state and, if he were not the choice of the machine, an organization able to cope with the machine's organization, which is a standing army, prepared to fight whenever called upon. As a distinguished citizen of to-day wrote over a quarter of a century ago, "The politicians would not be difficult to beat if the people would organize for their protection and from principle; *but it is the matter of organization which is difficult and no one understands this better than the bosses.*" (Wm. M. Ivins, on Machine Politics, 1887, p. 24.)

Presidential Primaries: Similarly, so-called "presidential primaries," where the voters instruct delegates to a national convention as to party candidates for president, are a sort of extension of the direct primary principle, still untried in New York, which, though advocated in the national platforms of the various parties, overlooks the fact that the usefulness of direct primaries in small localities is lost in large localities and that, in a system of representative government, the nominating of state and national officers may better be left to the united wisdom of delegates after a mutual interchange of ideas at conventions.

TITLE 4.—OFFICIAL PRIMARY ELECTIONS

Definition: The election law defines the term "official primary" or "official primary election" to mean a primary election held by a party for the purpose of nominating party candidates for office or for the election of any member of a party committee or for the election of delegates and alternates to a party convention (Sec. 3, subdiv. 2).

Date and Hours: The election law defines primary day to mean the day upon which an official primary election is held (Sec. 3, subdiv. 3). In each year, an official primary election must be held on the seventh Tuesday before the general election. This is the annual fall primary (Sec. 3, subdiv. 4). In presidential years, an additional official primary election must be held on the last Tuesday in March (Sec. 70, subdiv. 5). This is the spring primary (Sec. 3, subdiv. 5). The primary must be held open from 3 P. M. to 9 P. M., for voting thereat (Sec. 70, subdiv. 3).

Qualification of Voters: No person shall be entitled to vote at any official primary unless he is duly enrolled with the party holding the primary and may be qualified to vote on the day of election (Secs. 19, 71, 80). The inspectors decide all questions relating to the qualifications of voters (Sec. 71), but, if any enrolled voter is challenged and makes oath or affirmation that he is the person whose name he has given as his name and for thirty days has resided and still resides at the address which he has given as his residence "he shall be allowed to vote" (Sec. 72).

TITLE 5.—DESIGNATIONS FOR PRIMARY ELECTIONS

Definitions and Distinctions: Candidates for party nominations to be made at primaries and for election to party positions must be "designated" either by party committees, who designate by certificate (Sec. 49, subdiv. 2) or by other party members, who designate by petition (Secs. 45, 48). There is no such thing as an independent designation (*ante*, p. 36). The election law defines the term "designation" to mean any method by which candidates for party nomination or for election as party committeemen or delegates may be named in order that they may be placed on the official ballot for any official primary election (Sec. 3, subdiv. 10). It defines the term "party position" to mean membership in a party com-

mittee or the position of delegate or alternate to a party convention (Sec. 3, subdiv. 12).

Committee Designations: The various stated party committees designate candidates for party nomination for public office to be placed on the official primary ballot. Congressional, senatorial, judicial and like committees designate, respectively, the candidates for party nomination for representative in congress, for state senator, for justice of the supreme court and so on. If there is no appropriate committee, the designation is made by any other committee on which such power is conferred by the rules and regulations of the party (Sec. 46, subdiv. 1). Candidates for election as delegates to the state convention are designated by the committee of the political subdivision constituting the unit of representation of delegates thereto (Sec. 46, subdiv. 2). Candidates for election as members of the state committee are designated by the committees for the respective districts from which they are elected. A candidate for election as member of a committee other than the state committee is designated either by the member or members thereof from the same unit of representation or by such other committee, chosen by the enrolled party voters within such unit, as the rules and regulations of the party may prescribe (Sec. 46, subdiv. 3). Designation by party committees of candidates for party nominations or for party positions must be made in the manner provided by law and not otherwise (Sec. 46, subdiv. 4). The meeting of committees for the purpose of designation is the subject of a separate section. Fifteen days' notice must be given to each member (Sec. 47). Committee designations must be filed between the fourth and third Tuesdays preceding the primary (Sec. 49).

Designations by Petition: Enrolled members of a party who wish to make a primary contest against the ma-

chine and the candidates for nomination or party position whom its committees have designated, may designate other candidates for nomination or party position by petition. The form of such a petition is given in the law. It contains a certificate by each signer that he is a duly enrolled member of the party and entitled to vote at the next primary election (Sec. 48). Each petition must be signed by at least five per centum of the total enrolled voters of such party within the district, within which such office, or within the unit-area for which such party position, is to be filled and, at the same time, by not less than four per centum of the total vote cast in that political subdivision for the party candidate for governor at the last preceding gubernatorial election (Sec. 48). Designations by petition must be filed between the fourth Tuesday *and five days after* the third Tuesday preceding the primary (Sec. 49). There could be no more salutary primary reform than a radical reduction in the requisite number of signatories to designating petitions and an extension of the period of opportunity for inspecting committee designations and the filing of opposing petitions from five days to at least ten days. It is comparatively easy to secure signatures to an independent certificate of nomination, where there is no party restriction, but it is extremely difficult to persuade enrolled party men to sign designating petitions against the candidates of their own machine, and in most cases a requirement of five per cent, especially coupled with a period of only five days of opportunity, is absolutely prohibitive.

Designations are filed with the officer with whom certificates of nomination for the same offices are required to be filed. Designations as filed must forthwith be filed by the custodian of primary records in his office and be open to inspection as public records at all reasonable hours (Sec. 49).

Declinations. Vacancies: The law provides for the declination of any candidate designated (Sec. 50) and for the filling of vacancies in case of declination, death or disqualification of candidates. Vacancies are filled by a committee appointed for that purpose. (Sec. 52).

TITLE 6.—OFFICIAL PRIMARY BALLOT. UNOFFICIAL BALLOTS

The election law defines the term "official primary ballot" to mean the ballot prepared, printed and supplied for use at an official primary election (Sec. 3, subdiv. 11). Just as the legislation enacted between 1890 and 1895 marked a step forward in election reform, by providing for an official ballot for use at general elections, although the ballot so created is the clumsy ballot in general use to-day, so the Direct Primary Law of 1911 marked a step forward in primary reform, by providing for an official ballot for use at primary elections, although the primary ballot so created had little, if any merit, except that it *was* an official ballot.

Form of Ballot: Each party has its own official primary ballot. This is necessarily so, because each party holds its own primary election. The ballots of no two parties can be of the same color. The secretary of state designates the color for each party. Each ballot is divided into columns and provision is made for the voting for candidates by columns by making a single mark in a circle at the head of a column (Sec. 58). In view of the number of candidates elected at primaries to party positions (that is, to committees and as delegates and alternates), the use of columns has resulted in an extremely long ballot, one of the ballots of the last two years being no less than fourteen feet in length. The legislature of 1913 improved this situation to some extent by passing, over the Governor's veto, a bill reducing the depth of spaces for titles and for names

of candidates and providing that, if there be more than forty committeemen to be elected, the names of such committeemen may be printed in parallel columns, in which case the emblems shall be repeated at the top of the additional column, with the word "continued" (Laws of 1913, Chap. 800).

Preference to Machine: The primary ballot gives decided preference to committee designations, that is, to the organization or machine. The law provides that the name and emblem of the party be placed on the back of the ballot, below the stub and immediately at the left of the center of the ballot, so as to definitely inform the voter that the ballot which he is receiving is the primary ballot of his own party (Sec. 58), and also provides that the candidates designated by party committees shall be arranged in the first column, that is, in the column to the extreme left of the ballot (Sec. 58), and that the party emblem shall constitute the committee emblem of the party (Sec. 57), placing the party emblem at the top of the first column and thus inducing a party man to vote in the first column without giving the matter any consideration.

Machine Use of Party Emblem: The court of appeals has held that emblems are necessary at primaries the same as at general elections, so as to enable the voter to avoid mistakes and vote intelligently (*ante*, p. 30) and it has also held that the provision providing that the party emblem shall constitute the committee emblem of the party "simply gives effect to the truth, to the situation as it really exists, for the committee does not represent a faction in the party, but the party itself." (Hopper *v.* Britt, 204 N. Y. 524.) This decision, of course, settles the constitutional question, but the court apparently overlooked the important fact that the law directs that the party emblem be used in two totally distinct

senses on the ballot, first, on the outside, to represent the whole party, and second, on the inside, to represent the party machine. This is obviously unfair. Moreover, even from a strictly "organization" standpoint, it being concededly desirable that contests within a party should be fought out within the party, it would seem to be unwise, in such contests, to train party men contesting at the primaries to vote against their own party emblem. There is, therefore, much to be said in favor of prohibiting the machine from appropriating the party emblem, but, at the same time, authorizing the machine to have a primary emblem of its own, uniform throughout the state.

Emblems of Petitioners: Petitioners may select emblems, but not party emblems. Conflicts in emblems are determined in the manner, so far as practicable, provided for in respect to emblems to be placed on the official ballot at elections (Sec. 57). A faction of a party cannot be prevented from using at a primary election the emblem used by a membership corporation as an independent body at general elections. (Schieffelin *v.* Britt, 150 App. Div. 568, affirmed 206 N. Y. 677.)

Order of Candidates on Primary Ballot: The law provides for the order of candidates in columns. Such order, with omissions supplied by the courts, is, from top to bottom, as follows: Justice of the supreme court; representative in congress; state senator; member of assembly; county and city officers in the order in which they respectively appear upon the official ballot at the general election; delegates to state convention; member of state committee; member of county committee and other committees, in such order as the custodian of primary elections shall determine (Sec. 58); delegates and alternates to a national convention, where party rules direct that they be selected at primaries. (Duell *v.* Board of Elections, 205 N. Y. 79.)

Union Label: A primary ballot is not void because it bears a union label. (Matter of Peters, 60 Misc. 420.)

Unofficial Ballots: If, for any cause, the official ballots for any party shall not be provided as required by law at any polling place upon the opening of the polls of any primary election thereat, or if the supply of official ballots for any party shall be exhausted before the polls are closed, unofficial ballots, printed or written, made as nearly as practicable in the form of the official ballot, may be used (Sec. 81).

TITLE 7.—CONDUCT OF PRIMARY ELECTIONS. CANVASS OF RETURNS

Primary Districts and Notice: The custodian of primary records determines the various primary districts (Sec. 74) and gives notice of each official primary election (Sec. 75).

Officers: Election officials for each election district within a primary district comprise the election officers for such primary district (Sec. 70, subdiv. 1). They must take and subscribe the constitutional oath of office, before entering on the discharge of their duties (Sec. 70, subdiv. 2), and perform the same duties that they are required to perform at a general election, and such additional duties as are prescribed for primaries (Sec. 70, subdiv. 4).

Paraphernalia: The paraphernalia of primaries are substantially the same as at general elections (Sec. 79).

Manner of Voting: The provisions as to the folding and delivery of ballots and manner of voting (Sec. 80) are substantially similar to the corresponding provisions relating to general elections, which are fully considered hereafter (*post*, p. 86). The voter, on receiving his ballot, forthwith retires alone to a voting booth and, without undue delay, unfolds and marks his ballot. The provisions as to the preparation of the ballot by the

voter, including the voting of straight or split tickets, and the rules as to the intent of voters (Secs. 82, 86) are virtually the same as the corresponding provisions relating to general elections (*post*, p. 104).

Canvass of Votes: As soon as the polls at any official primary election close, the board of primary inspectors must forthwith publicly canvass and ascertain the result thereof. They must not adjourn or postpone the canvass until it is fully completed. The provisions as to the method of canvass relating to primary elections are substantially the same as those relating to general elections (*post*, p. 89), but not so elaborate (Sec. 85).

Proclamation and Statement of Result: Immediately upon the completion of the canvass, the board must make public oral proclamation of the result thereof and also a written statement of such result upon the statement of result sheet, which it files with the custodian of primary records, and also a duplicate thereof, which it files with the clerk of the city, town or village (Sec. 87).

Disposition of Ballots: Ballots rejected as void or protested as marked for identification must be inclosed in a separate sealed package and filed with the original statement of the canvass (Sec. 85). Other ballots are replaced in the ballot boxes, which, after being securely locked and sealed, are returned to the officer from whom they were received, who must keep the same safely for not less than thirty days and until all suits or proceedings touching the same shall have been finally determined (Sec. 88).

Persons Within the Guard-Rail: The only persons to be admitted within the guard-rail are election officers, watchers, persons admitted by the inspectors to preserve order or enforce the law, persons duly admitted for the purpose of voting and, at the canvass, candidates (Sec. 83). Deputy superintendents of election are prohibited from attending primary elections except for the purpose of vot-

ing (Sec. 489). The superintendents, however, may attend any election and presumably may be admitted within the guard-rail even at primary elections (Sec. 479).

Electioneering: Electioneering within any polling place or within one hundred feet therefrom is prohibited, and no political banner, poster or placard shall be allowed in or upon a polling place on any primary day (Sec. 84).

Canvass of Statements of Result: The custodian of primary records (board of elections) canvasses the statements of results filed with it and must complete its canvass within one hundred and twenty hours from midnight of the day upon which the primary election was held. It acts ministerially. It has no power to take evidence or otherwise act than to canvass the statements. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33; Matter of Thomas E. Rush, 42 Misc. 70, Clarke, J.) When it completes its canvass, if the office to be filled is within its jurisdiction, it delivers certificates of nomination to nominees and certificates of election to those elected to party positions. In the case of those candidates whose designations are required to be filed in the office of the secretary of state, the board certifies a statement to him and he thereupon canvasses the statements filed with him, and delivers certificates of nomination to nominees and certificates of election to those elected to party positions. A certificate of nomination or election entitles the person to whom it is issued, if a candidate for public office, to a place on the official election ballot, as a candidate of his party for the office for which he has been nominated; and, if a candidate for party position, to membership in the committee or to a seat in the convention to which he is elected (Sec. 89).

Special Elections and Unofficial Primaries: The law also contains provisions for party nominations for special elections (Sec. 91), and for so-called "unofficial" primaries (Sec. 3, subdiv. 2, Sec. 92).

ARTICLE VI

INDEPENDENT NOMINATIONS

TITLE 1.—IN GENERAL

Distinctions: At the beginning of the discussion of the system of elections in New York, it was pointed out that the distinction between parties and independent bodies is one to be constantly kept in mind in considering the election law (*ante*, p. 36). This is particularly true at this point. Chronologically, each party committee of every party has now made its designation. Each anti-machine group of enrolled party members of the various parties has made its designation by petition. Each party has held its primary and the official canvasses have resulted, in due course, in the nomination of party candidates for all the parties. In short, the party nominating machinery has fully completed its work and the duly nominated candidates of the various parties are commencing their campaign for election. All nominations, however, have not yet been made, for there still remain such additional nominations as may be made independently of party machinery. These are the so-called "independent nominations," which will now be considered.

Definitions: "Independent bodies" make "independent nominations" of "independent candidates" or "nominees." The term "independent body" means any organization or association of citizens, which, by petition, nominates candidates for office and which, if it nominated candidates to be voted for at the preceding general election of a governor, did not poll at least ten thousand votes for any candidate nominated by it for any office to be voted for by all the electors of the state (Sec. 3, definition 15).

Construction: In construing the laws relating to independent nominations, the most liberal construction should be placed thereon in favor of the independent voter. (Matter of Adams, 21 Misc. 396, Herrick, J.; Matter of Bulger, 48 Misc. 584.) Thus, such laws will be construed to cover all offices, whether expressly mentioned or not. (Matter of Fagan, 21 Misc. 403, Gaynor, J.)

Privileges: An independent body of voters, who entertain the same political views, is entitled to have all its nominees, state and local, placed in a single column under the same emblem. (Matter of Wise, 108 App. Div. 52.)

TITLE 2.—QUALIFICATIONS OF SIGNATORIES

An independent body may nominate a candidate who has been nominated by one or more of the parties or one who has not been nominated by any party. A signer of an independent certificate must be a duly qualified elector of the district for which the nomination is made and must be or become registered, that is, he must be a registered voter (Sec. 123), but it does not matter whether he registers before or after signing the certificate. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; People *ex rel.* Steinert *v.* Britt, 146 App. Div. 683. Compare Matter of Horan, 108 App. Div. 269.)

Levy Law and Indorsing or Mushroom Columns: An enrolled member of a party may sign an independent certificate. He may bolt all or one of his party's nominees, but he is prohibited from signing a mere "indorsing petition" *for his own party's candidates* (Sec. 123). Prior to the enactment of Chap. 649 of the Laws of 1911 (Levy law), a grave abuse had become widespread at elections of having tickets and candidates repeated over and over on the ballot, causing a reduplication of identical columns with identical tickets. At the Gaynor-Bannard-Hearst election of 1909, the ballot contained no less than nineteen columns.

Mayor Gaynor's name stood at the head of eight columns and Mr. Bannard's name at the head of three. Yet that election merely furnished an aggravated example of what was happening at nearly every general election. Campaign managers, seeking the advantage of what had the appearance of an independent indorsement of their candidates, persuaded enrolled members of their own party to sign pretended "independent" certificates, nominating "independently" the identical candidates whom their party had already placed in nomination, thus securing for their ticket or candidates the right to run under an independent name and an independent emblem, in a separate additional column of the ballot (Matter of Brevillier, 116 App. Div. 144, affirmed 186 N. Y. 266), although, as a matter of fact, there was not even a scintilla of "independence" about the nominations. They were of party candidates made by party men. The additional columns were "mushroom columns" and nothing else. They greatly increased the length of the ballot. They served no useful purpose whatever. The Levy law effectually cured this abuse, by providing that, in case a candidate nominated by an independent certificate of nomination be, at the time of filing the certificate, or afterwards, the candidate of a political party for the same office, the name of no person who is an enrolled member of *such* political party shall be counted upon such independent certificate of nomination (Sec. 123). This provision, in the first place, recognized "the sacred right of a party man to bolt," thereby rendering ineffective a dangerous decision to the contrary (Matter of Commissioner of Elections, 64 Misc. 620, Andrews, J.); and, secondly, it prohibited party men from signing indorsing petitions for their own party candidates. It was exactly what was needed to strike "mushroom columns" from the ballot. Its effect, according to the Court of Appeals, was "to prevent a

wrongful use of independent nominations." (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231.) The much-abused Levy law, therefore, may be said to have cut the existing ballot in half and to that extent to have marked a step forward in the cause of ballot reform.

TITLE 3.—NUMBER OF SIGNATORIES

The courts have repeatedly pointed out that, in view of the great difference in population among the various counties, a requirement that specified numbers of signatures be obtained for each office regardless of the number of voters in the county or other district cannot be just to all, and a percentage of the number of voters in each county or district would result more satisfactorily and justly; and the Court of Appeals recently held some of the numbers specified under statutes running back more than a decade to be prohibitive and therefore unconstitutional, and, in effect, specified new numbers in the place thereof. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231, as supplemented and modified by People *ex rel.* Woodruff *v.* Britt, 206 N. Y. 246; Matter of Cohoes, 78 Misc. 87, Chester, J.) The legislature of 1913 complied with this mandate of the court of appeals by passing, over the Governor's veto, a law providing that independent nominations of candidates for offices to be voted for by the voters of any political subdivision of the state can only be made by *five per centum* of the total number of votes cast for governor at the last gubernatorial election in such political subdivision. The law retained the provision that nominations for offices to be voted for by all the voters of the state can only be made by six thousand or more voters (including fifty from each county) and also provided that not more than three thousand voters shall be required to make an independent nomination in *any* political subdi-

vision and not more than one thousand five hundred for a borough or county office (Sec. 122, as amended by Laws of 1913, Chap. 800).

TITLE 4.—THE CERTIFICATE AND ITS EXECUTION

An independent certificate of nomination may be made for the nomination of more than one candidate, if the signers are qualified to make a certificate as to all the candidates. (Matter of Independent Nominations, 186 N. Y. 266, 278, reversing Matter of Bennet, 116 App. Div. 138.) A certificate must contain the title of the offices to be filled, the name and residence of each candidate nominated. It may designate a committee to fill vacancies. Each signer, after signing, adds his place of residence and makes oath that he has truly stated his residence and that it is his intention to support at the polls the candidacy of the person or persons nominated in the certificate (Sec. 123).

Forgery, Fraud and Irregularity: Even though a certificate apparently contains forgeries and irregularities, they do not affect it unless it appears, with sufficient clearness, that they reduce the number of legal nominators below the requisite number. (Matter of Walker, 134 App. Div. 947.) Reduplications are forgeries, but unregistered signatures are not. (Matters of Baillee and Archibald, 78 Misc. 84, 86, Chester, J.) If a certificate consists of more than one sheet, no separate sheet can be received if five per centum of the names thereon are fraudulent or forged. This may be avoided by placing all the signatures on one sheet or each signature on a sheet by itself. The provision is aimed at procuring honesty in the preparation and filing of these certificates. Its validity has been upheld by the courts. (Burke *v.* Terry, 203 N. Y. 293; Matter of Baillee, *supra.*)

For the purpose of ascertaining whether a person whose name appears on a certificate did not sign the same, his affidavit or testimony that he did not do so is *prima facie* evidence of that fact. If the name of a person who has signed a certificate appears upon another certificate nominating the same or a different person for the same office, it cannot be counted upon either certificate (Sec. 123).

ARTICLE VII

REGISTRATION

TITLE 1.—DEFINITIONS AND DISTINCTIONS

The term "registration" is not expressly defined in the election law, but it means the method by which a voter places his name on an official record or register of the persons in the election district in which he resides who are qualified to vote in such district at the next general election. Registration has nothing to do with parties or independent bodies, nor with enrollment, nominations or voting on election day. Its function is merely to provide, in advance of elections, an authentic list of qualified voters for each election district, thereby tending to prevent illegal voting. The ideal registration law would be one which afforded the fullest opportunity to qualified voters to get their names on the register, coupled with complete precaution against fraudulent voting. Registration is now necessary at all general elections, as is indicated by the oft-repeated warning in the public press at registration time "If you do not register, you cannot vote." It is not required for town and village elections not held at the same time with a general election (Sec. 161).

TITLE 2.—REGISTRATION IN RURAL COMMUNITIES

The constitution divides the state into two divisions and provides that, in cities and villages having five thousand inhabitants or more, voters shall be registered upon personal application only; but voters not residing in such cities and villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters. (Constitution, Article 2, sec. 4.) It thus makes a sharp distinction between populous districts and rural communities, requiring personal registration in the former and prohibiting its requirement in the latter on the first day of registration. The legislature of 1911 (Chapter 649 of the Laws of 1911) increased the number of registration days in rural communities from two to four. It also attempted to make a substantial change in the method of registration in such communities. The statute then in force directed the inspectors to place on the register, at the first meeting, the names of all persons who had voted at the last preceding general election, except the names of voters proven to their satisfaction to have since ceased to be voters in such district; and at both meetings, the names of all persons known or proven to their satisfaction to be entitled to vote at the election for which such registration is made (Laws of 1909, Chap. 22, secs. 150, 159). These provisions not only permitted voters in rural communities to be registered on the first day of registration without appearing personally, but they did *not* even *require* personal appearance on the *second* day of registration. The act of 1911 attempted to approximate the requirements somewhat more closely to the requirements in city districts and directed the inspectors to place on the register at the first meeting only the names of persons who voted at the last preceding election and prohibited the plac-

ing of any other names on the register at the first or any other meeting except on personal application. The effect of this amendment was to require first voters and all other voters residing in the country who did not vote at the preceding general election to apply in person in order to be registered even on the first day; and the court of appeals held that this provision was unconstitutional. The legislature, it held, might require "proper proofs" and, within the limits of reason, the nature of the proof is under its control. It might require application by letter, or through an agent, proof by affidavit or the testimony of a third person; but it could not authorize or require the inspectors to refuse to register an applicant if he should not appear personally on the first day. (Fraser *v.* Brown, 203 N. Y. 136.) The legislature of 1913 passed, over the Governor's veto, a bill reducing from *four* to *two* the number of days of registration in rural communities (Sec. 150 as amended by Laws of 1913, Chap. 800). Otherwise, the text of the act of 1911 still remains on the statute books, and the law is particularly obscure because the court of appeals, in holding the statute of 1911 unconstitutional, did not expressly state whether or not it held the provision as to country registration unconstitutional in its entirety and thus did not decide whether a voter may now register in a rural community *on the second day of registration* without a personal application. The existing statute, held to be unconstitutional, prohibits such registration; but the former law authorized it. More recent decisions, however, have held that the provision is void in its entirety. (Matter of Danniels, 74 Misc. 485, Wheeler, J.; Matter of Randall, 73 Misc. 539, Kellogg, J.).

Imperfect Registration: Since the voters of the year before are entitled to registration without further act on their part, the fact that the inspectors omit a voter's

residence does not preclude him from voting. (Matter of Matthews, 143 App. Div. 561.)

TITLE 3.—QUALIFICATIONS AND DISQUALIFICATIONS OF VOTERS

The election law repeats in substance the constitutional qualifications (Sec. 162) and disqualifications (Sec. 175) of voters, and the constitutional provisions against gaining or losing a residence by sojourn in the service of the United States, and elsewhere (Sec. 163). These provisions have already been discussed (*ante*, p. 14).

Convicts: The law provides in addition, that conviction of a felony is a disqualification, unless the person is pardoned and restored to citizenship (Sec. 175), but this provision does not apply where the person has been sentenced or committed to a house of refuge or other reformatory (Penal Law, Sec. 644), nor where sentence has been suspended. (People *v.* Fabian, 192 N. Y. 443.) The attorney-general has ruled that it applies to a conviction in the federal courts. (Carmody, A.-G., A.-G. Rep. of 1912, p. 339.)

Removal: The law provides that, if a voter, after registering, move within the same election district, he may have the register corrected and vote on election day (Sec. 165). He does not become disqualified by the subsequent demolition of the building which is his place of residence before election day. (People *ex rel.* Perry *v.* Hagan, 25 Misc. 125.) If, however, he moves out of the election district between registration day and election day, he loses his vote.

Naturalized Persons: The inspectors may require of naturalized citizens the production of their naturalization papers, or a certified copy thereof, and to make oath of identity, but if a naturalized citizen, for any reason,

cannot produce such papers, he may furnish other evidence which will satisfy the board of his right to be registered (Sec. 174); and if the board refuses to place his name upon the register, he may compel it to do so by mandamus. The inspectors act ministerially in these matters, as in all others. (People *ex rel.* Noel *v.* Smith, 10 Misc. 100.)

TITLE 4.—THE REGISTER

The inspectors make a quadruplicate register, each inspector making a copy (Sec. 154). The pages of the register are arranged in twenty-four columns, to contain each voter's name, residence, age, place of birth, length of residence and other information, and the twenty-second column contains the words "the foregoing statements are true" and is reserved for the signature of voters who register personally (Sec. 155). All four registers must be certified by all the inspectors (Sec. 176). The register made by the chairman is and is known as the public copy of register and must be left in a prominent position in the place of registration from the first day of registration until election day and at all reasonable times must be open to public inspection and for making copies thereof (Sec. 177). The other three copies are variously disposed of (Secs. 177–8). After election, the public copy and the two copies used by the inspectors go to the board of elections (Sec. 180).

TITLE 5.—CONDUCT OF REGISTRATION

Registration Days: Registration days are the fourth and third Fridays and Saturdays before a general election and the hours of registration are from 7 A. M. to 10 P. M. (Sec. 150). They are not holidays (Sec. 166).

Procedure: In considering the conduct of registration, the voter is concerned only with those cases where he is required or voluntarily elects to register in person, because in other cases the inspectors place his name on the register if he is known or proven to their satisfaction to be entitled to vote at the next election. In cases where the voter registers in person, the process of registration consists simply in his appearing before the board, answering a number of questions relating to his qualifications, and signing his name, by his own hand, under the words "The foregoing statements are true." That is all there is to it.

Inability to Sign Register: If a voter alleges his inability to sign, he is further examined from a list of questions known as "identification statements for registration day" and, after he has answered them, the inspector certifies that he read such questions to the voter and truly recorded the latter's answers (Sec. 155).

Illiterate and Disabled Voters: If a voter is required to register personally and declares that he is unable to write, by reason of illiteracy, or that he will be unable to prepare his ballot without assistance by reason of blindness, loss of both hands, inability of both hands for ordinary purposes, or that he will be unable to enter the voting booth without assistance by reason of diseased or crippled condition, the nature of which he must specify, the board must administer an oath to him to the effect that he will be unable to prepare his ballot without assistance because of his condition (Sec. 164).

Challenges: Any person who applies personally for registration may be challenged by any qualified voter or watcher who is present. If an applicant be so challenged, or if any inspector has reason to suspect that he is not entitled to have his name registered, the chairman or any inspector must administer to him an oath to make

true answer to certain questions and then an inspector must read to him a list of questions specified in the law and contained in a so-called "challenge affidavit" (Sec. 168) and enter the answers on the affidavit, and the applicant subscribes his name thereto. If the applicant, by his answer, satisfies a majority of the board of his right to be registered, they must register his name as an elector; if not, they shall point out to him the qualifications which he lacks and his name shall not be registered, except upon an application to the court. If the applicant refuses to make oath or to answer any questions, he thereby becomes disqualified (Sec. 169). The inspectors must deliver all challenge affidavits to the police or sheriff for investigation (Sec. 170) and keep copies for their own use on election day (Sec. 171).

Entry Requiring Challenge on Election Day: Any voter may make oath to the board that he has reason to believe that any person on the register will not be qualified to vote and the board must place the words "to be challenged" opposite such person's name and, when such person offers his vote at such election, must administer to him the general oath as to qualifications. If he refuses to take such oath, he cannot vote (Sec. 173).

ARTICLE VIII

GENERAL AND SPECIAL ELECTIONS

TITLE 1.—TIME AND PLACE

General Election: The general election is the election which must be held annually on the Tuesday next succeeding the first Monday in November (U. S. Revised Statutes, Sec. 131; N. Y. Constitution, Article 3, Sec. 9, Article 12, Sec. 3; Election Law, Secs. 3, definition 1, 290).

Special Election: The governor, in his discretion, is authorized to proclaim a special election to fill an elective office in certain cases and under certain restrictions (Sec. 292).

Election Day: Election day is a holiday (General Construction Law, Sec. 24). No parade or drill of the active militia may be ordered for that day (Military Law, Sec. 111). While the polls are open, no person may sell, expose for sale, or give away any liquor within a quarter of a mile of a polling place (Liquor Tax Law, Sec. 30). No toll shall be charged or collected from any person going to or from the polls (Transportation Corporation Law, Sec. 130). Service of legal process may apparently be made, as it may on Christmas Day. (Didsbury *v.* Van Tassel, 56 Hun, 423), Lincoln's Birthday (Matter of Bornemann, 6 App. Div. 524) and Labor Day (Flynn *v.* Union Surety Co., 170 N. Y. 145).

Hours: The polls of every general election must be opened at 6 A. M. and close at 5 P. M. There shall be no adjournment or intermission until the polls are closed (Sec. 291). Under a former statute it was held that, at 5 P. M., the delivery of ballots to voters must cease, and no voter to whom a ballot had not been delivered before 5 P. M. could be allowed to vote (Newcomb *v.* Leary, 128 App. Div. 329), even though standing on a line of waiting voters within the polling place or even within the guard-rail. Since that decision, however, the law has been amended and, under the present statute, all voters "who are *in the polling place*" at or before 5 P. M. "*shall be allowed to vote*" (Sec. 291).

Place: The town board of each town and the common council of each city, except New York and Buffalo, and the board of election of each of the latter cities, must designate annually the place in each election district at which the meeting for the registration of voters and the

election shall be held (Sec. 299) and cause lists of the places so selected, with their boundaries, to be published in newspapers supporting the candidates nominated that year by the two parties, respectively, polling the highest and next highest number of votes in the state at the last preceding election for governor (Sec. 301). The selection of newspapers used to be based on advocacy of the principles of such parties (People *ex rel.* Quinn *v.* Voorhis, 187 N. Y. 327), but this was changed in 1913 to support of the candidates nominated—a definite bribe to the papers in a pending campaign (Laws of 1913, Chap. 587). The same law increases the number of papers in Manhattan from four to five and authorizes two of them to be newspapers published in the Jewish language.

TITLE 2.—VACANCIES IN PUBLIC OFFICE

A vacancy occurring before October fifteenth of any year in any office authorized to be filled at a general election must be filled at the general election held next thereafter, unless otherwise provided by the constitution or unless previously filled at a special election (Sec. 292). The reference to the constitution refers to vacancies in the office of governor and lieutenant-governor, as to which there is devolution of title (Constitution, Article 4, Secs. 6, 7). It has also been said to refer to offices not made elective by the constitution which may be filled by appointment for the balance of the unexpired term or by election at some other election, as may be provided (*ante*, p. 26; Public Officers Law, Sec. 38; People *ex rel.* Ward *v.* Scheu, 167 N. Y. 292). A vacancy in the office of justice of the supreme court is not authorized to be filled at an election unless the vacancy occurs not less than *three* months before such election (Constitution, Article 6, Sec. 4).

TITLE 3.—PARAPHERNALIA

Booths, Ballot Boxes, Guard-Rail, etc.: Each polling place must contain a sufficient number of voting booths of specified dimensions, at least one for every seventy-five registered voters. Each booth must be fitted with a swinging door, a shelf and supplies and conveniences, including pencils having black lead only, and must be kept clearly lighted while the polls are open, by artificial lights, if necessary. Each polling place must contain a guard-rail provided with a place for entrance and exit (Sec. 317). There must be separate ballot boxes for general ballots, presidential electors, spoiled and mutilated ballots, detached stubs, questions submitted, and town propositions (Sec. 316). There shall be one and one-half times as many official ballots of each kind as there are registered voters (Secs. 330, 340).

Blank Forms, etc.: There shall also be blank forms for election officers, consisting of two tally sheets (Secs. 334–336), three ballot return blanks (Secs. 334, 337), three election return blanks (Secs. 334, 338) and three blanks for report of assisted and challenged voters (Secs. 334, 339). There must also be sample ballots, cards of instruction, two poll books, distance markers, etc. (Sec. 341).

Tally Sheet: The tally sheet is the original entry of the canvass of the votes and is the most important of the records and governs in case of any discrepancy between it and the original statement or the return kept by the inspectors. (Matter of Stewart, 155 N. Y. 545; Matter of Hearst, 183 N. Y. 274; Matter of Stiles, 69 App. Div. 589.)

TITLE 4.—CONDUCT OF ELECTIONS AND METHOD OF VOTING

Election Officers: The election officers for each election district, consisting of four inspectors of election, two poll

clerks and two ballot clerks (*post*, p. 129), are required to meet at the polling place at least one half hour before the time set for opening the polls—that is, by 5.30 A. M. In case there is a vacancy, it must be filled (*post*, p. 130).

Oaths: Each election officer must take and subscribe the constitutional and statutory oath of office within five days after notice of his appointment (Sec. 307). In addition, he must make oath, before the opening of the polls for election that he "will not in any manner request, or seek to persuade, or induce any voter to vote any particular ticket or for any particular candidate, and that he will not keep or make any memorandum or entry of anything occurring within the booth, and that he will not, directly or indirectly, reveal to any person the name of any candidate voted for by any voter, or which ticket he has voted, or anything occurring within the voting booth, except he be called upon to testify in a judicial proceeding for a violation of the election law" (Sec. 357).

Organization of Board: Before otherwise entering upon their duties, the inspectors of each district must immediately appoint one of their number chairman, or if a majority do not agree upon such appointment, they must draw lots for that position (Sec. 314). The inspectors also designate, or choose by lot, one of their number to receive the ballots from the voters (Sec. 353), and choose by lot another inspector to compare the signatures of voters made in the registration book on registration day with their signatures made in the poll book to be signed by them on election day. The chairman also designates one of the poll clerks to keep such poll book and a poll clerk to keep the book containing identification statements for election day (Sec. 355).

Opening the Polls: The election officers must arrange the space within the guard-rail and the furniture thereof, including the voting booths, for the orderly and legal con-

duct of the election. The inspectors are responsible for having then and there the register of voters, the various ballot boxes, ballots and other paraphernalia of elections; and they must open the sealed packages, post the instruction cards, deliver the ballots to the ballot clerks, and the poll books to the poll clerks, cause the distance markers to be placed one hundred feet away from the polling place, be sure that the voting booths are supplied with pencils having black lead only, unlock the ballot boxes, see that they are empty and relock them (Sec. 350). One of the inspectors shall then make proclamation that the polls are open and of the time in the afternoon when they will be closed (Sec. 350). The following proclamation may be used:

> "Hear ye! Hear ye! Hear ye! The polls of this election are opened, and all persons attending the same are strictly charged and commanded, by the authority and in the name of the people of this state, to keep the peace thereof during their attendance at this election on pain of imprisonment. And all persons are desired to take notice that the polls will be closed at five o'clock in the afternoon." (Instructions for election officers, as published under direction of the secretary of state.)

Conditions During Polling Hours: After the boxes are relocked, they shall not be unlocked or opened until the closing of the polls (Sec. 350). There shall be no electioneering within the polling place or within one hundred feet therefrom (Sec. 352). No person shall be admitted within the guard-rail, except superintendents of election, deputy superintendents (Sec. 479), inspectors, poll clerks, ballot clerks, watchers, persons admitted by inspectors to preserve order or enforce the law, persons admitted for the

purpose of voting and, during the canvass, candidates (Sec. 351). The proceedings of the board are public. The inspectors may neither close the polls nor retire therefrom to deliberate (Secs. 291, 315). Each inspector has full authority to preserve peace and good order and enforce obedience to his lawful commands (Sec. 315).

Procedure in Voting: In order to vote, the voter enters within the guard-rail and forthwith proceeds to the inspectors and gives his name and residence. One of the inspectors, thereupon, announces his name and residence in a loud and distinct tone of voice (Sec. 356). The inspectors other than the inspector designated to receive ballots ascertain whether he is duly registered and, if he is, announce that he is so registered (Sec. 353). If he is not registered, he cannot vote (Sec. 356). Each poll clerk enters the voter's number, name and residence in his poll book, and the voter signs his name in the poll book kept for the purpose below the words, "The foregoing statements are true." The inspector previously designated for the purpose compares the voter's signature in the poll book with his signature in the registration book and if the signature is the same or sufficiently similar as to identify it as having been written by the same person, the inspector certifies that fact by writing his initials after such signature. If the voter, on registration day, alleged his inability to so sign, then a poll clerk reads to him the same list of questions as were required to be read on registration day from a book of "identification statements for election day" and writes the answers thereto. If the signatures or answers do not correspond, any watcher or challenger may and, if they do not, the inspectors must challenge the voter (Sec. 355). If the voter is entitled to vote and is not challenged, or, if challenged and the challenge be decided in his favor, an inspector or ballot clerk delivers to him one official ballot or set of ballots

duly folded (Sec. 356). The voter's receipt of the ballot is the commencement of the act of voting. If, thereafter, the voter leaves the space within the guard-rail, before voting, he cannot enter again within the guard-rail for the purpose of voting or receive any further ballots (Sec. 359). On receiving his ballot, the voter forthwith and without leaving the enclosed space retires alone, unless he be one entitled to assistance (*post*, p. 88), to one of the voting booths, and, without undue delay, unfolds and marks his ballot. If all the booths are in use and voters are waiting, he can occupy his booth only five minutes (Sec. 358). The voter, having marked his ballot, leaves the voting booth with his ballot folded so as to conceal the face of the ballot, but show the indorsement on the back; and, keeping the same so folded, proceeds at once to the inspector in charge of the ballot box and offers the same to such inspector. This inspector announces the voter's name and the printed number on the stub in a loud and distinct tone of voice. The poll clerks report whether the number on the poll books and the number of the ballot or ballots delivered to the voter is the same as the number on the stub (Sec. 355). Then, if such voter be entitled then and there to vote and be not challenged, or if challenged and the challenge be decided in his favor, and if his ballot or ballots are properly folded and have no mark or tear visible on the outside thereof, and if the printed number on the stub is the same as that entered on the poll books as the number on the stub, such inspector shall receive such ballot or ballots and, after removing the stub or stubs therefrom in plain view of the voter and without removing any other part of the ballot or in any way exposing any part of the face thereof below the stub, deposits each ballot in the proper ballot box for the reception of voted ballots (Sec. 359) and the stubs in the box for detached ballot stubs (Secs. 353, 359). As each voter votes, the inspectors check his name

upon the register and enter therein the number on the stub of the ballot or set of ballots voted by him (Sec. 353). Upon voting, the voter passes outside the guard-rail, unless he be one of the persons authorized to remain within the guard-rail for other purposes than voting (Sec. 359). Upon the close of the polls, the poll clerks and inspectors compare the poll books with the registers and correct any mistakes (Sec. 355).

Illiterate or Disabled Voters. Any voter who, at registration, has made oath to physical disability or illiteracy (*ante*, p. 79) or who, being registered, makes oath that he has become so disabled since registration, or who, not being required to register in person, makes oath to physical disability or illiteracy, may choose two election officers of different faith to assist him in preparing his ballot. At any town meeting or village election, where the election officers are all of the same political faith, any voter entitled to assistance may select one of such election officers and one voter of such town or village of opposite political faith from the election officer to render such assistance (Sec. 357).

Employees: Employers must allow their employees two hours in which to vote (Sec. 365).

TITLE 5.—CHALLENGES

Time: The right of any person to vote whose name is on the register is subject to challenge (Sec. 356). He may be challenged either when he applies to the ballot clerk for his ballots or when he offers his ballots to the inspector or previously, by notice to that effect to an inspector by any elector (Sec. 361).

Who may Challenge: Any inspector must challenge every person offering to vote whom he knows or suspects not to be duly qualified as an elector and every person

challenged at registration, provided such challenge has not meanwhile been withdrawn. Any watcher or challenger may also challenge any voter (Sec. 361).

Procedure on Challenge: The ordinary course of procedure on a challenge is the administering of the so-called "preliminary oath," followed by a prescribed examination (Sec. 362). Where a person applies to vote on the name of a person challenged at registration, the preliminary oath is administered and the questions on the challenge affidavit asked again. This gives an opportunity of comparing the two sets of answers and descriptions. If there is any material difference or conflict between the answers or in the descriptions, the law provides that the applicant's vote "shall not be received" (Sec. 361). In all cases, however, if the applicant persists in his claim to vote and the challenge is not withdrawn, the so-called "general oath" is administered and, in a proper case, particular oaths relating to the cause of challenge; *and if the voter takes all the oaths tendered to him, his vote "shall be accepted"* (Sec. 363; People *ex rel.* Smith *v.* Pease, 30 Barb. 588), even if some one else has already voted on his name. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) A voter cannot even be deprived of his right to vote by arrest. He must be afforded the privilege of voting before he is removed from the polling place. (Sec. 315; People *ex rel.* Borgia *v.* Doe, *supra;* People *v.* Hochstim, 76 App. Div. 25.) Of course, in any case where an applicant refuses to comply with the statutory tests, either by refusing to take any oath or answer any question, he loses his right to vote (Secs. 361–3).

TITLE 6.—ORIGINAL CANVASS BY ELECTION OFFICERS

In General: As soon as the polls are closed, the inspectors must publicly canvass and ascertain the votes and

not adjourn or postpone the canvass until it shall be fully completed. The boxes must be opened and the general ballots canvassed and then the questions submitted, if any. The room in which such canvass is made shall be clearly lighted and such canvass shall be made in plain view of the public. It shall not be lawful for any person or persons, during the canvass, to close the main entrance to the room in which such canvass is conducted in such manner as to prevent ingress and egress.

Election officers should not sign any statements, under any circumstances, until the canvass of the votes is entirely finished and perfected (Sec. 366).

Verifying Number of Ballots: The inspectors commence the canvass by comparing the poll books with the registers as to the number of voters who have voted, correcting any mistakes therein, and by counting the ballots found in the ballot boxes (without unfolding them, except so far as to ascertain that each ballot is single), and by comparing the number of ballots found in each box with the number shown by the poll books and the ballot clerks' statement to have been deposited therein.

If the ballots found in any box are more than the number of ballots so shown to have been deposited therein, the ballots must all be replaced, without being unfolded, in the box from which they were taken, and thoroughly mingled therein, and one of the inspectors designated by the board, without seeing the same and with his back to the box, must publicly draw out as many ballots as shall be equal to such excess and, without unfolding them, forthwith destroy them.

If two or more ballots are found in the ballot box so folded together as to present the appearance of a single ballot, they must be destroyed if the whole number of ballots in such ballot box exceeds the whole number of ballots shown by the poll books and ballot clerks' state-

ment to have been deposited therein, and not otherwise.

If there lawfully be more than one ballot box, no ballot found in a wrong box is, for that reason, to be rejected, but must be placed in its proper box by the inspectors upon the count of the ballots before the canvass, and counted in the same manner as if found in the proper box, if such ballot does not, together with the ballots found in the proper box, make a total of more ballots than are shown by the poll books and ballot clerks' statement to have been deposited in the proper box. No ballot that has not the official indorsement shall be counted, except such as are voted in accordance with the provision relating to unofficial ballots (Sec. 367).

Method of Counting: The chairman unfolds the ballots. The method of counting is as follows: The straight ballots are separated from the split ballots and counted, and the number of straight party votes for each candidate entered in gross opposite his name on each tally sheet by the poll clerks. The chairman then takes the split ballots separately, and announces the vote for each candidate on each ballot, in the order of the offices printed thereon, and each poll clerk makes an accurate tally of the same. As the votes on each split ballot are counted, the ballot must be passed to the other inspectors for verification. The poll clerks then add together all the votes for each candidate and the ballots wholly blank and void, together with the ballots on which no votes were counted for any candidate for such office, and enter the sum thereof on the tally sheet. As soon as the count is completed for each office, the poll clerks must submit the result to the inspectors for examination and, if found to be correct, the chairman shall at once announce the result (Sec. 369).

Protesting Ballots: When any particular ballot is not void and an inspector of election or other election officer

or duly authorized watcher, during the canvass of the vote, declares his belief that such ballot has been written upon or marked in any way for the purpose of identification, the inspectors shall write on the back of such ballot the words "protested as marked for identification," and shall specify over their signatures upon the back thereof the mark or marking upon such ballot to which objection is made. The votes upon each such ballot must be counted by them, as if not so protested (Sec. 370).

Powers of Inspectors: Inspectors cannot determine qualifications. The duty of the inspectors to canvass the votes after rejecting the ballots declared void, like all their other duties (*ante*, p. 16), is ministerial and they cannot determine any question of a candidate's eligibility. (Matter of Atkinson, 28 Misc. 694, affirmed 45 App. Div. 628.)

Statements of Canvass: Upon the completion of the canvass, the inspectors make and sign an original statement thereof, containing, among other things, a return of the ballots voted, following which there shall be a separate return for each office of the votes cast for each candidate therefor. At the end of each return and also at the bottom of each sheet or half sheet, they also make and sign a certificate that the foregoing statement is correct. They must also make two certified copies of the original statement (Sec. 373).

Statements as to Questions Submitted: If ballots are voted on any constitutional amendment, proposition or question, a similar return of the ballots and votes cast thereon shall be made and included as a part of the original statement.

Proclamation of Result: Upon the completion of the canvass and the making of the original statement and copies thereof, the chairman must make a public oral proclamation of the whole number of votes cast at the

polling place for all candidates for each office, upon each proposed constitutional amendment or other question or proposition, if any, voted upon at such election, the whole number of votes given for each person, with the title of the office for which he was named on the ballot; and the whole number of votes given respectively for and against each proposed constitutional amendment or other question or proposition, if any, so submitted (Sec. 375). Such proclamation should be made in the form following:

> "Hear ye! hear ye! hear ye! The whole number of votes given for the office of (governor) found in the box just canvassed was 389, of which number there were given for said office, for Levi P. Morton (243), for David B. Hill (120), for Francis E. Baldwin (26)," (naming each person voted for, for the office of governor, and the number of votes given for him for that office).
>
> "The whole number of votes given for the office of lieutenant-governor, found in the same box, was.....; of which there were given for that office, for Charles T. Saxton....., for Daniel N. Lockwood....." Proceed on with the votes given for the different candidates. (Instructions for election officers, as published under direction of the secretary of state.)

Police Statements: In all cities and villages of five thousand inhabitants or more, the chairman thereupon delivers to the police officer on duty at the place of canvass a statement subscribed by the board, stating the number of votes received by each candidate for office. Such statement shall forthwith be conveyed by the said officer to the stationhouse of the police precinct in which such place of canvass is located, and he shall deliver the same inviolate to the officer in command thereof, who

shall immediately transmit by telegraph, telephone or messenger, the contents of such statement to the officer commanding the police department of such city or village. Such statement shall be preserved for six months by the police, and shall be presumptive evidence of the result of such canvass for each such office (Sec. 372).

Sealing Statements: The statements of canvass must be securely sealed in separate envelopes and kept inviolate by the officers or board with whom they are filed, until delivered, together with the sealed packages of void and protested ballots, to the appropriate board of canvassers (Sec. 376).

Disposition of Statements, etc.: In New York City, the chairman of the board files the original statement of canvass, the sealed package of void and protested ballots and a poll book and tally sheet with the county clerk; and an inspector, designated by him, files a certified copy of the statement and the other poll book and tally sheet with the board of elections (Sec. 378). Elsewhere, the chairman files the poll book, containing the signatures of voters, with the superintendent of elections, the original statement and package of void and protested ballots and a tally sheet with the board of elections, a certified copy of the statement, the other poll book and the other tally sheet with the town or city clerk, and delivers the other certified copy of the statement to the supervisor, or, if there is none, or he is absent, to an assessor (Sec. 377). The procedure is somewhat different in Erie County (Sec. 380).

Void and Protested Ballots: Each ballot declared void shall be indorsed upon the back with the specific reason for such rejection. The void and protested ballots are secured in a separate sealed package and filed by the chairman with the original statement of the canvass (Sec. 373).

Unofficial Ballots: Whenever unofficial ballots are voted, the inspectors must return all of such ballots in the package with the void and protested ballots (Sec. 373).

Preservation of Ballots in Boxes: The ballots voted, except the void and protested ballots, must be replaced in the box from which they were taken, together with a statement as to the number of such ballots so replaced. Each such box shall be securely locked and sealed, and shall be deposited with the officer or board furnishing such boxes. They shall be preserved inviolate for six months after such election, and may be opened and their contents examined upon court order, and at the expiration of such time the ballots may be disposed of in the discretion of the officer or board having charge of them (Sec. 374). An office holder whose election is contested has no standing to urge the destruction of ballots after the statutory six months has expired. (Matter of Hearst, 117 App. Div. 240.)

TITLE 7.—IRREGULARITIES AT ELECTIONS

De Facto Officers: An election is not invalidated although held by officers who were such *de facto* merely. (People *v.* Cook, 8 N. Y. 67.)

Irregular Ballots: It is not invalidated by honest mistakes or slight omissions in printing the ballot (*ante*, p. 54).

Carelessness of Election Officers: It is not invalidated by reason of the carelessness of the election officers. (People *ex rel.* Williams *v.* Board of Canvassers, 183 N. Y. 538, affirming 105 App. Div. 197, on opinion of Chester, J., below; Matter of Norton, 152 App. Div. 628.)

TITLE 8.—CANVASS BY COUNTY, CITY AND STATE BOARDS

On election night, the public gets the results of election from rapid calculations made from the police returns, it

being obviously impossible for any official board to collate all the figures on the statements of result for each election district in a short period of time. This figuring, however, must be done before the newly elected officers can receive their certificates of election, and the process consists in "canvasses" made by county, city and state officials, organized as boards of canvassers, for the special service of so canvassing the votes. (Hankins *v.* Mayor, 64 N. Y. 18.) While the provisions of the law as to these official canvasses are complex and unsystematic, the scheme itself is simple and the canvass little more than successive tabulations of results until the addition of figures as to each candidate authorizes a determination as to who is elected. The official canvass is invariably made, in the first instance, by county boards, who meet on the Tuesday next after election. Each county board consists of the supervisors of the county, except in counties in New York City, where it consists of the members of the board of aldermen elected within the county (Sec. 430). County boards make their respective canvasses from the original statements of canvass made in the various election districts (Sec. 431). Their work is purely ministerial. (People *v.* Cook, 8 N. Y. 67; People *ex rel.* Noyes *v.* Board of Canvassers, 126 N. Y. 392; People *ex rel.* Sherwood *v.* Rice, 129 N. Y. 391; People *ex rel.* Derby *v.* Rice, 129 N. Y. 461.) They have not even the power to determine that John Evans is Dr. John J. Evans, nor can the courts compel them to do so by mandamus. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33; People *ex rel.* Kathan *v.* Board of Canvassers, 75 App. Div. 110; Kortz *v.* Board of Canvassers, 12 Abb. N. C. 84.) They have the power to summon the inspectors to make corrections where it clearly appears that certain matters are omitted or that any merely clerical error exists, but the inspectors cannot change or alter any decision made by them, but can only

cause their canvass to be correctly stated (Sec. 432). Thus, where the ballots correctly stated the name of David A. Munro, Jr., but the name is variously spelled and designated in the inspectors' statements, the inspectors can be compelled to make their statements correct. (People *ex rel.* Munro *v.* Board of Canvassers, 129 N. Y. 469.)

Each county board, upon the completion of its canvass, makes various statements, separately stating the result as to various candidates, and containing the total results in its county for all candidates and questions submitted (Sec. 437). They must determine what persons have been elected to the office of assemblyman and to county offices and school commissions, and their determination completes the canvass as to those officers (Sec. 438).

In counties which contain one or more cities, except Buffalo, the county boards constitute the city board (Sec. 430) and it seems to follow that their determination is final as to such city officers.

The canvasses by the county boards leave a further canvass necessary for those officers who run for office in more than one county, and also for questions submitted. This further canvass and the determinations thereon are made by the board of elections in New York City, which sits as a board of canvassers for such city officers (Sec. 440), and by the state board of canvassers, which makes the final canvasses as to all other officers and as to questions submitted (Secs. 439, 441). Their duties are also purely ministerial. (Matter of Hines, 141 App. Div. 569.) The state board consists of the secretary of state, attorney-general, comptroller, state engineer and surveyor and treasurer (Sec. 441). Both the state board and the board of elections canvass the certified copies of the statements of the county board of canvassers (Secs. 440, 442).

The secretary of state delivers certificates of election

based on certified copies of the determinations filed with him (Sec. 443).

ARTICLE IX

BALLOTS AT GENERAL ELECTION

TITLE 1.—THE OFFICIAL BALLOT

Printing: The custodian of primary records or board of elections prepares and prints the official ballots (*ante*, p. 54). It must have the same in its possession and open to public inspection four days before the election for which they are prepared (Sec. 342). No ballot without the official indorsement shall be allowed to be deposited in the box, except where unofficial ballots are authorized to be used (*post*, p. 100) and none but ballots provided in accordance with the provisions of the law shall be counted (Sec. 359. See, however, *ante*, p. 54).

Form: It is hardly necessary to describe the official ballot at length. It is a large, party column ballot, inviting the voter to vote a straight ticket by making a single voting mark in one of the large blank circles, three-quarters of an inch in diameter, at the head of one of the tickets or lists of candidates, and reluctantly permitting him, if he is sufficiently versed in the election law to learn and comply with the multitude of rules on the subject, to vote a split ticket by accurately scattering voting marks in the circles and blank inclosed spaces designated as "voting spaces" on the left of and before the names of the candidates. The law provides that the lists of candidates of the several parties shall be printed in parallel columns, each column headed by the chosen device of such party and the party name or other designation, in such order as the secretary of state may direct, precedence, however, being given to the party which polled the highest number of votes for governor at the last preceding general

election for such officer, and so on. The number of such columns shall exceed by one the number of separate tickets of candidates to be voted for at the polling place for which the ballot is provided. The last column is the "blank column," in which the voting spaces are omitted, but which, in all other respects, is a duplicate of the other columns. This column is designed to afford the voter the right to write, under the title of any office, the name of any person whose name is not printed on the ballot for whom he desires to vote.

In presidential years there are two official ballots, one for presidential electors and the other for the remaining officers (Sec. 331).

The statutory provisions now on the statute books relating to the ballot have been, in part, declared to be unconstitutional (Hopper *v.* Britt, 203 N. Y. 144), but the text of the statute has not yet been amended so as to repeal the unconstitutional deadwood.

TITLE 2.—QUESTIONS SUBMITTED

Every amendment to the constitution proposed by the legislature, unless otherwise provided by law, must be submitted to the people for approval at the next general election after action by the legislature in accordance with the constitution (Secs. 294–5). Constitutional amendments or other propositions or questions provided by law to be submitted to a popular vote are printed together on a single ballot, other than the official ballot, separately numbered and printed, and separated by a broad, solid line (Sec. 332).

TITLE 3.—SAMPLE BALLOTS

Sample ballots must be provided for every polling place. They are printed on paper of a different color from the

official ballot and have no number on the stubs. In other respects they are precisely similar to the official ballots to be voted at that polling place. Any voter is entitled to one of these ballots on election day before he votes, and he may take it away before receiving his official ballot (Sec. 333).

TITLE 4.—UNOFFICIAL BALLOTS

If the official ballots required to be furnished shall not be delivered at the time required, or if, after delivery, shall be lost, destroyed or stolen, the proper officials shall cause other ballots to be prepared, as nearly in the form of the official ballots as practicable, but without the indorsement, and, upon proper proofs, the inspectors of election shall cause these unofficial ballots to be used in the same manner, as near as may be, as the official ballots (Secs. 345, 360).

Defective official ballots are not unofficial ballots. (People *ex rel.* Nichols *v.* Board of Canvassers, 129 N. Y. 395.)

TITLE 5.—BALLOT REFORM

There are two propositions for ballot reform at general elections, the short ballot and the Massachusetts ballot. These two reforms are often confused, but they have nothing in common.

Short Ballot: The term "short ballot" is a misnomer. Its advocates, as such, are not concerned with the form of the ballot at all, but they seek to reduce the number of elective officers and thus center responsibility on the fewer officers who are elected. The importance of the principle is obvious. Its application, however, is always a question of degree. In New York State, most state government officials are appointed and only a few state officers and the

members of the legislature are elected. Where should the line be drawn?

Massachusetts Ballot: The advocates of the Massachusetts ballot, as such, are not concerned with the number of officers to be elected, but they seek to simplify the form of the present ballot, by abolishing the party columns, placing all the candidates for each office in a single block or section, and requiring the voter to make a single voting mark for each candidate for whom he wishes to vote. The law in force in Massachusetts does not provide for emblems, but this peculiarity is not essential to the Massachusetts form of ballot and, in New York, where the courts have declared emblems to be necessary, so as to enable the voter to avoid mistakes and vote intelligently (Hopper *v.* Britt, 204 N. Y. 524, 528), most legislation providing for the Massachusetts form of ballot has provided for emblems. (See Saxe-Shortt bill of 1911, Saxe-Dana bill of 1912, Herrick-Carver bill of 1913.)

It has already been pointed out that the important election is the general annual November election, and all the machinery of any system of elections culminates when each voter casts his single vote at that election; so that the most important reforms are obviously those which will produce the greatest simplicity in voting at general elections and afford the greatest opportunity to voters to vote intelligently at general elections (*ante*, p. 36). The most important of all election reforms, therefore, is the Massachusetts ballot, far more important, for instance, than any primary reform, which can affect nominations only. The Massachusetts ballot, especially with emblems, is fairer than the New York ballot both for voter and for candidate, more likely to produce intelligent voting and elect worthy candidates and much simpler to vote and to count. Voters are prone to think little enough in any event and a requirement that each voter must make one

annual voting mark for each and every candidate for whom he wishes to vote is not too onerous, but, on the contrary, should act as a mild stimulant to more intelligent voting. The Massachusetts ballot affords each candidate an opportunity regardless of party. Under the present law, straight lists of candidates are annually elected to office. Although many of these candidates would not have a fighting chance in a single-handed contest against their opponents on the merits, yet they are elected by the column ballot, because of a distinguished standard-bearer at the head of his ticket, or because of a fusion between two minority parties on all except the head of the ticket, or because of the importance of some party principle and the indifference and laziness of the voter who is required to make but one cross.

Fifteen years ago the court of appeals criticised the "obscure and cumbersome nature" of the present law and declared that "the public records show that at every election in this state many thousands of votes cast by the electors are rejected for some defect in the ballots used and which are condemned or supposed to be condemned by the statute as void," and the court thereupon appealed to the legislature, saying that "the process of voting to many uneducated persons and to some who are educated, is so difficult that votes enough are thrown out by the canvassers in some cases to determine the result of the election. Whether it is wise to so frame laws that govern the casting and counting of votes at an election in such a way as to render it very difficult, if not impossible, for many of the electors to deposit a valid ballot in the ballot box, is a question for the legislature. It is quite apparent that, under the present system, the result of an election is not always determined by the will of the majority, since, unless they comply with all the provisions of the statute, their votes cannot be counted." (People *ex rel.*

Feeny *v.* Board of Canvassers, 156 N. Y. 36, 44–45.) More recently, Bartlett and Vann, JJ., declared: "The present law has many defects, particularly in regard to the form of the ballot and the mode of voting the same, and radical amendments are required to secure a fair election without disfranchising a large number of voters by reason of complicated provisions that are not readily understood." (Hearst *v.* Woelper, 183 N. Y. 274, 291.)

The "obscure and cumbersome nature" of the present law also puts a premium on straight voting and, in estimating the relative fairness of the Massachusetts and New York forms of ballot there must be charged against the latter not only the "many thousands of votes rejected for some defect in the ballot," but also many additional thousands of votes cast by voters who vote a straight ticket every year, lest, by attempting more intelligent choice of men rather than parties, they may be wholly disfranchised by some mistake in marking the ballot.

The Massachusetts ballot has been voted intelligently by the working classes in Massachusetts. It is in use by labor unions for their own elections. The illustrations on pages 1 to 7 each show two columns from a municipal ballot, variously marked. Those who assert that the rare instances where the people, in electing a party to office, have rewarded a single officer running on an independent ticket, prove or tend to prove that the voters to-day understand how to split their ticket, are invited to examine these illustrations and decide for themselves for whom each should be counted. There should, of course, be no difficulty about any of them.

ARTICLE X

MARKING THE BALLOT

TITLE 1.—STATUTORY RULES

The marking of the ballot now in use, under the rules necessary to govern the same and the corresponding rules declaring legislative conjectures as to the voter's intent under varying circumstances, are contained in two sets of provisions, one containing directions as to the preparation of ballots by the voter (Sec. 358) and the other construing the intent of the voter after he has voted (Sec. 368). The former provisions set forth that it shall not be lawful to make any mark upon the official ballot other than the cross mark made for the purpose of voting, with a pencil having black lead, and that only in the circles or in the voting spaces to the left of the names of the candidates, or to write anything thereon other than the name or names of persons not printed upon the ballot for whom the voter desires to vote in the blank column under the proper title of the office, with a pencil having black lead; nor shall it be lawful to deface or tear a ballot in any manner, nor to erase any printed device, figure, letter or word therefrom, nor to erase any name or mark written thereon by such voter. These provisions also lay down the following rules, which the voter "should observe" (Sec. 358).

"Rule 1. If the voter desires to vote a straight ticket, that is, for each and every candidate of one party for whatever office nominated, he should mark a cross mark in the circle above the name of the party at the head of the ticket.

Rule 2. If the voter desires to vote a split ticket, that

is, for candidates of different parties, he should not make a cross mark in the circle above the name of any party, but should make a cross mark in the voting space before the name of each candidate for whom he desires to vote, on whatever ticket he may be.

Rule 3. If the ticket marked in the circle for a straight ticket does not contain the names of candidates for all offices for which the voter may vote, he may vote for candidates for such offices so omitted by making a cross mark before the names of candidates for such offices on other tickets, or by writing the names, if they are not printed upon the ballot, in the blank column under the title of the office.

Rule 4. If the voter desires to vote for any person whose name does not appear upon the ballot, he can so vote by writing the name with a pencil having black lead in the proper place in the blank column.

Rule 5. The voter can vote blank for any office by omitting to make a cross mark in any circle, and making a cross mark in the voting space before the name of every candidate he desires to vote for, except for the office for which he desires to cast a blank vote.

Rule 6. In the case of a question submitted, the voter shall make a cross mark in the blank square space on the right of and after the answer, "Yes" or "No," which he desires to give on each such question submitted.

Rule 7. Any straight line crossing any other straight line at any angle within a party circle, or within a voting space, shall be deemed a valid voting mark."

The rules construing the intent of voters are as follows (Sec. 368).

"Rule No. 1. If the elector shall have made a voting mark in the circle above one ticket only, and no other voting mark appears on any other ticket or tickets, and if no name shall have been written in the blank column,

he shall be deemed to have cast his vote for all the candidates printed on the ticket so marked in the circle.

Rule No. 2. If the elector shall have made a voting mark in the circle above one ticket only, and shall have also made a voting mark or marks in the voting space or spaces before the name or names of a candidate or candidates only on the ticket so marked in the circle, the voting marks in the spaces before the names of candidates on such ticket shall be treated as surplusage, and his vote shall be deemed to have been cast for all the candidates printed on the ticket so marked in the circle.

Rule No. 3. If the elector shall have made a voting mark in the circle above one ticket only, and shall have also made a voting mark in the voting space or spaces before the name or names of a candidate or candidates on one or more other tickets, he shall be deemed to have cast his vote for all the candidates printed on the ticket so marked in the circle, except for those for whom he has indicated his intention not to vote, by making a voting mark in the voting space before the name or names of individual candidates, on one or more other tickets, or by writing a name in the blank column; and the candidate or candidates so individually voted for on such other ticket or tickets shall be deemed to be the elector's choice for such office or offices; provided, however, that:

Rule No. 4. When two or more persons are to be voted for, for the same office, as two or more justices of the supreme court or presidential electors, and the names of the several candidates therefor are printed under the title of the office for which all are running, and the elector shall have made a voting mark in the circle at the head of a ticket, and shall also have made a voting mark in the voting space before the name of one or more of a group of candidates for such office on other tickets, provided that he shall not have marked the names of two or more

of such candidates upon the same line upon the ballot, he shall be deemed to have cast his vote for all the candidates for such office so individually marked and for those marked in the circle, except for those candidates under such circle so marked whose names are upon the same line on the ballot as the names of the candidates so individually marked, or written in the blank column, unless in addition to making the voting mark in the circle at the head of the ticket he shall also have made a voting mark before each one of the group of candidates for such office for whom he desires to vote on the ticket so marked in the circle; provided further, however, that:

Rule No. 5. When two or more persons are to be voted for for the same office, as two or more justices of the supreme court or presidential electors, and the names of the several candidates therefor are printed on any ticket under the title of the office for which all are running, and the elector shall have made a voting mark in the circle at the head of the ticket, and shall also have made a voting mark in the voting space before the name of more than one of the group of candidates for such office printed on the same line on the ballot on other tickets, or by writing the name or names of a candidate or candidates in the blank column; he must also indicate by voting marks in the voting spaces on the ticket so marked in the circle the individual candidates of the group of candidates on such ticket for whom he desires to vote, or his vote shall only be counted for the candidates for such office which are so individually marked on other tickets, or written in the blank column.

Rule No. 6. If the elector shall have made a voting mark in more than one circle at the head of the tickets, and if on either of such tickets there shall be one or more candidates for office for which no other candidate or candidates is or are printed on such other ticket or tickets so

marked in the circle, his vote shall be counted for such candidate or candidates only.

Rule No. 7. Subject to the foregoing rules if the elector mark more names than there are persons to be elected to an office, or if for any other reason it is impossible to determine the elector's choice of a candidate for an office to be filled, his vote shall not be counted for such office but shall be returned as a blank vote for such office.

Rule No. 8. In the case of a question submitted, if the elector shall have made a voting mark in the voting space after the printed word "Yes," his vote shall be deemed to be in favor of the adoption of the question submitted; if he shall have made a voting mark in the voting space following the printed word "No," his vote shall be deemed to be against the adoption of the question submitted.

Rule No. 9. A void ballot is a ballot upon which there shall be found any mark other than a cross mark made for the purpose of voting, which voting mark must be made with a pencil having black lead, only in the circles or in the voting spaces to the left of the names of candidates; or one upon which anything is written other than the name or names of persons not printed upon the ballot, for whom the elector desires to vote, which must be written in the blank column under the proper title of the office with a pencil having black lead; or one which is defaced or torn by the elector; or upon which there shall be found any erasure of any printed device, figure, letter or word, or of any name or mark written thereon, by such elector; or in which shall be found inclosed a separate piece of paper or other material; and upon such ballot no vote for any candidate thereon shall be counted; but no ballot shall be declared void because a cross mark thereon is irregular in character.

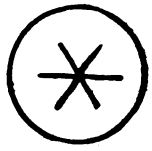
Rule No. 11. If the elector shall have made a voting

mark in the voting space before the words "no nomination," such mark shall be regarded as surplusage."

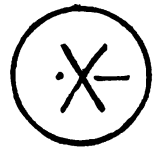
TITLE 2.—CROSS MARKS AND MARKS OTHER THAN A CROSS MARK

Statutory Provisions: A valid voting mark is now defined as "any straight line crossing any other straight line at an angle within a party circle or within a voting space" (Sec. 358, rule 7, as amended by Laws of 1911, Chap. 296—Saxe Law). In addition to this, the statute provides that it is not lawful to make any mark other than the cross mark made for the purpose of voting (Sec. 358) and that a void ballot is one upon which there shall be found any mark other than a cross mark made for the purpose of voting, but no ballot shall be declared void because a cross mark thereon is irregular in character (Sec. 368, rule 9).

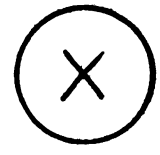
Whether a ballot is so marked as to be void presents a question of law to be determined on the face of the ballot. (People *ex rel.* Feeny *v.* Board of Canvassers, 156 N. Y. 36; People *ex rel.* Krulish *v.* Fornes, 175 N. Y. 114; People *ex rel.* Courtney *v.* Unger, 85 App. Div. 249.)



Fallon Ballot
No. 79
Fig. 8



DeGroot Ballot
No. 39
Fig. 9



Fallon Ballot
No. 112
Fig. 10

Distinctions: In the first place, it should be borne in mind that a mark in addition to a cross mark, whether made for the purpose of voting or otherwise, may be a part of the cross mark itself, making a three-line mark,

irregular in character (Fig. 8), or it may be wholly disconnected with the cross mark (Fig. 9), possibly even appearing in a separate circle (Fig. 10). These two classes of additional marks must be considered separately, because, in one case, the question to be determined is whether the voter has made a valid voting mark, while, in the other, the question is whether certain additional lines appearing on the ballot make the ballot void, although the voting mark may be valid.

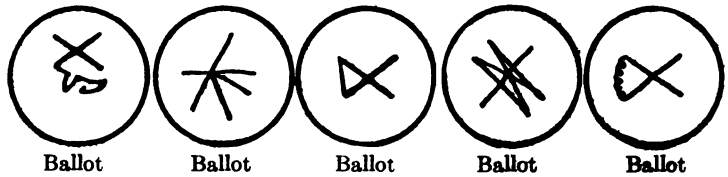
Additional Marks Disconnected With the Cross Mark: In Matter of Fallon (197 N. Y. 336), and Matter of De-Groot (197 N. Y. 589), the court of appeals passed upon a number of ballots which bore marks in addition to and disconnected with the voting mark, and the court uniformly held such ballots to be valid. Examples of two of these valid marks are given in Figures 9 and 10. Similarly, Judge Lambert, in trying the recount of ballots upon the Hearst-McClellan recount, passed upon many ballots bearing long or short, dark or light lines, which he uniformly held to be accidental. (Judge Lambert's Rulings on the Markings of Ballots by John G. Saxe. See also People *ex rel.* Feeny v. Board of Canvassers, 156 N. Y. 36, Ballot 145.)

Irregular Cross Marks: Under the law as amended by Chap. 296 of the laws of 1911 (Saxe law), any cross mark is a valid voting mark which contains any line crossing any other line. A three-line cross or a tit-tat-to mark is as valid as a simple two-line cross.

History of Cross Mark Law: The election law of 1896 (Laws of 1896, Chap. 909) defined a valid voting mark as "one straight line crossing another straight line" (Sec. 105), and that definition remained in the law, without change, until the enactment of the Saxe law. During the intervening period, however, the legislature made changes in the rules construing the intent of voters in

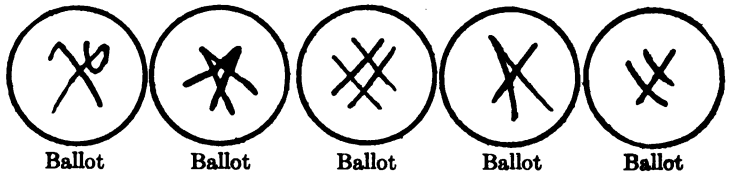
making a voting mark. Thus, Chap. 335 of the Laws of 1898 added a rule including among void ballots "a ballot upon which there shall be found any voting mark other than the cross mark made for the purpose of voting" (Sec. 110); and Chap. 654 of the Laws of 1901 amended this rule by adding the word "single," so that the phrase read "a ballot upon which there shall be found any mark other than a *single* cross mark made for the purpose of voting." This latter amendment followed a decision of the court of appeals adopting a liberal construction of the former statute. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra.*) In Matter of Fallon, *supra*, the court held that the construction of the statute, so far as it requires "one *straight* line crossing another straight line," should be liberal, because "it is practically impossible for a person to make a line that is technically straight without the use of mechanical appliances" and, while making extremely liberal rulings on many voting marks, it held that the word "single," added by the legislature after the Feeny decision and the use of the word "one" in the phrase "*one* straight line crossing another straight line" required it to declare a number of crosses to be void. (See also Thacher *v.* Lent, 71 App. Div. 483.) The Saxe law of 1911 met the Fallon decision squarely, by striking from the statute both the word "single" and the word "one" and by providing, in addition, that no ballot should be declared void because a cross mark thereon was irregular in character. Under the provisions of the statute as thus amended, the constructive definition of a voting mark is more liberal than it has ever been, legalizing *any* line crossing *any other* line and not merely one line crossing another line. The destructive provision as to void ballots no longer contains the word "single" and, to settle all doubt, the saving clause provides that no ballot shall be declared void because a voting mark thereon

is irregular in character. For instance, the court of appeals, in Matter of Fallon, *supra*, held the following voting marks to be valid:



Ballot No. 39 Fig. 11 | Ballot No. 43 Fig. 12 | Ballot No. 86 Fig. 13 | Ballot No. 98 Fig. 14 | Ballot No. 104 Fig. 15

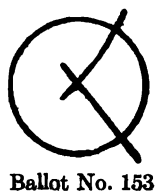
and the following voting marks to be void:



Ballot No. 13 Fig. 16 | Ballot No. 63 Fig. 17 | Ballot No. 146 Fig. 18 | Ballot No. 158 Fig. 19 | Ballot No. 169 Fig. 20

Under the Saxe law, each and every one of these voting marks is unquestionably valid.

Miscellaneous Marks: There are also a few other voting marks which occasionally appear.



Ballot No. 153 Fig. 21

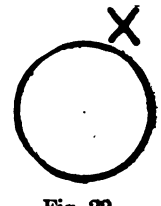
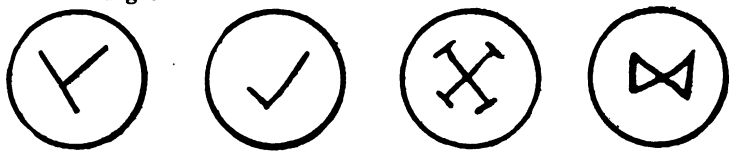


Fig. 22



From Judge Lambert's Rulings on the Marking of Ballots by John G. Saxe

Fig. 23 | Fig. 24 | Fig. 25 | Fig. 26

The cross mark in Figure 21 is a valid mark. It is immaterial if the arms of the cross mark extend beyond the circle providing they cross within it, (Matter of Fallon, *supra;* see also People *ex rel.* Pierce *v.* Parkhurst, 24 Misc. 442; Ballots V, W), but the law requires the voter to make the lines cross within the voting space, so that the cross mark in Figure 22 renders the ballot void. (People *ex rel.* Wells *v.* Common Council, 154 N. Y. 750, affirming, on opinion of Parker, J., below, 19 App. Div. 457.) The "T" in Figure 23 and the check mark in Figure 24 do not contain any line crossing any other line and are void, although where a ballot contains a number of crosses and the voter has carelessly failed to complete one of them, the courts usually sustain the validity of the ballot. (People *ex rel.* Pierce *v.* Parkhurst, *supra;* Judge Lambert's Rulings, *supra*). The cross mark, with feet, in Figure 25 was held valid by Judge Lambert and is undoubtedly valid under the Saxe law. The hour glass in Figure 26 was held invalid by Judge Lambert, but is validated by the Saxe law.

Effect of Saxe Law on Recounts: The Saxe law thus gives effect to the real intention of voters. It also goes a long way to prevent recounts. Unsatisfactory condition of many polling places, poor eyesight and clumsy fingers result in a multitude of irregular voting marks in every polling place at every election. (People *ex rel.* Moran *v.* Sniffin, 123 App. Div. 730; Matter of Hearst, 48 Misc. 453), so that the courts early recognized that, to hold every ballot void on which a mark was found which was not a "single" cross mark consisting of "one straight line crossing another straight line," would be to annually disfranchise a substantial portion of the electorate and make elections a farce. Thus the courts, from the first, imposed upon the statutory definition of a cross mark the further question of the voter's intent—was his mark

made for the purpose of voting or did he intend to identify his ballot?—and if they found that the voter did not mark his ballot for identification, they held the ballot valid. Yet once the courts departed from the statutory definition, they found themselves in a legal puzzle department that permitted of an endless diversity of guess work for its various solutions. This condition led to recounts every year, which did nothing but afford opposing counsel an opportunity to display ingenuity as to what the various voters intended; and an examination of some of the highest court's decisions in the Fallon case indicates that, in recounts at least, it was truly only "the court of last conjecture." (Compare Figures 11 to 15 with Figures 16 to 20.) The stricter the rulings the greater the opportunity for legal guess work and the greater chance upon a recount, and yet recounts really were no more likely to be correct than the original canvass by the inspectors. Thus, Judge Lambert, after presiding over the counting of six hundred thousand ballots in the Hearst-McClellan recount, charged the jury, with great significance, that "it must appear plain to you, as it does to me, that the accuracy of the original count of the votes was quite as correct as we have reached in this proceeding." The Saxe law, by enacting a liberal construction of voting marks effectually ended guess work as to the voters' intent. Recounts have been rare occurrences ever since.

TITLE 3.—BLACK LEAD PENCILS. WRITINGS. ERASURES. TEARS

The election law provides that it shall not be lawful to make any mark except with a pencil having black lead, or to write anything on the ballot except the names of persons not printed on the ballot, or to deface or tear

a ballot or to erase anything thereon (Sec. 358), and includes in the category of a void ballot any ballot violating these provisions (Sec. 368, rule 9).

Black Lead: The use of purple lead (People *ex rel.* Obert *v.* Bourke, 30 Misc. 461, 465), ink or blue pencil clearly invalidates the ballot (Judge Lambert's Rulings, *supra*).

Writings: Ballots containing the names of candidates written in the blank column whose names are already printed on the ballots are void. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra;* Judge Lambert's Rulings, *supra.*) If the written name is misspelled, however, there is no presumption of identity and the ballot is valid. (People *ex rel.* Obert *v.* Bourke, 30 Misc. 461.) In writing a name on a ballot, a cross mark should not be used. (Jackson, A.-G., A.-G. Rep. of 1907, p. 555.)

Erasures: Ballots objected to because of erasures, cancellations or for being defaced cannot be counted. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra;* People *ex rel.* Obert *v.* Bourke, *supra;* Judge Lambert's Rulings, *supra.*)

Tears: Torn ballots are held to be valid, unless the tears conclusively appear to have been the act of the voter. (Thacher *v.* Lent, 71 App. Div. 483; Judge Lambert's Rulings, *supra.*)

TITLE 4.—HOW TO MARK A STRAIGHT TICKET

A voter may vote a straight ticket, that is, vote for each and every candidate of one party for whatever office nominated, in either of two ways. He may make a voting mark in the circle above the name of the party at the head of the ticket (Sec. 358, rule 1; Sec. 368, rule 1). He may also make voting marks in every voting space on such ticket. Even if he makes a voting mark in a circle and also makes voting marks in one or more voting spaces

on the same ticket, the latter marks will be treated as surplusage and the ballot must be counted for all the candidates printed on such ticket (Sec. 368, rule 2). This ballot is indicated in Figure 3, where the voter was apparently desirous of making sure of voting for Justices Bartow S. Weeks and Robert L. Luce for re-election to the supreme and city courts, respectively (*ante*, p. 3), and must be counted for all the democratic candidates.

TITLE 5.—HOW TO VOTE A SPLIT TICKET

A voter may vote a split ticket, that is, for candidates of different parties, in either of two ways. He may make a cross mark in the voting space before the name of each candidate for whom he desires to vote (Sec. 358, rule 2). This ballot is indicated in Figure 1 (*ante*, p. 1) and must be counted for all the republican candidates, except Mitchel, Cardozo and Ransom, and for former Justice Edward E. McCall, for Mayor, and for Justices Weeks and Luce for the supreme and city courts. He may also make a voting mark in a circle and voting marks in voting spaces before the names of candidates on other tickets and his vote will be counted for all the candidates printed on the ticket marked in the circle, except those on the same line opposite the candidates on the other ticket for whom he has especially indicated his choice by individual voting marks (Sec. 368, rule 3). This ballot is indicated in Figure 2 (*ante*, p. 2) and must be counted precisely the same as Figure No. 1.

Voting for a Group: Split voting becomes even more complicated where the voter wishes to choose between a group of two or more persons to be elected to the same office, as two or more justices of the supreme court, or presidential electors, or coroners (Sec. 368, rules 4, 5). The safest way for a voter to split a ticket for a group

would seem to be to make a separate cross mark for each one of the group for whom he desires to vote. This method of voting is indicated in Figure 4 (*ante*, p. 4), which must be counted for all the democratic candidates, except for Judge of General Sessions, and for Judge Warren W. Foster and Assistant District Attorney Nott for that office (Sec. 368, rule 5).

In canvassing votes for a *group*, it is imperative to note that it makes no difference that the voter has indicated his choice by voting for two candidates of the group whose names are printed opposite each other on the same line (Sec. 368, rule 5). This is indicated by Figures 4 and 7 (*ante*, p. 7). Figure 7 represents the 1902 ballot and must be counted for the democratic ticket, and for *only two* out of the *three* justices, Justices McCall and Keener, the only two indicated by cross marks, and *blank* for the third.

Blanks for Particular Offices: If a voter mark more names than there are to be elected to an office, his vote shall be *blank* for such office (Sec. 368, rule 7), but may be counted for the balance of the ticket. This is indicated by Figure 5 (*ante*, p. 5), which should be counted for all the democratic candidates except for borough president, for which office it is blank, and by Figure 6 (*ante*, p. 6), which should be counted for all the republican candidates, except for the two vacancies for justice of the supreme court, for all of which it is blank.

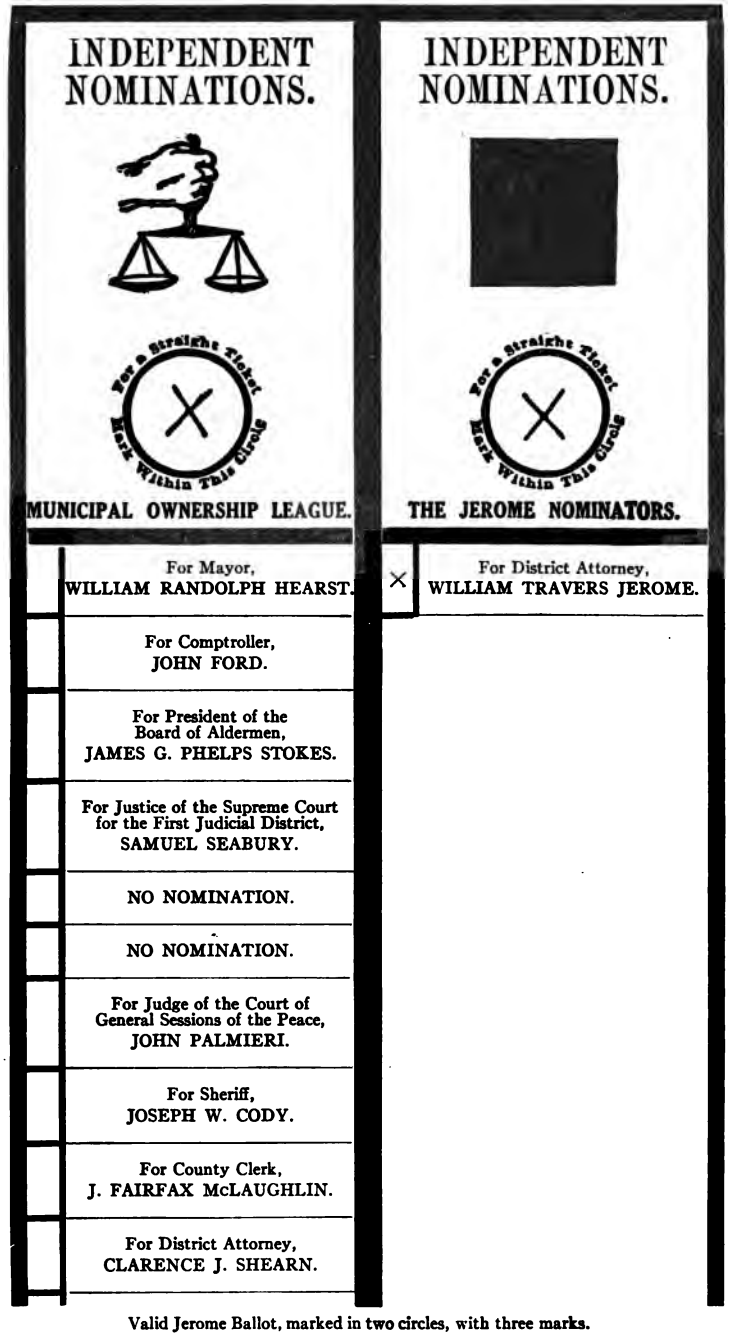
If a voter vote both yes and no upon one proposition submitted, his votes may still be counted on other propositions. (Tamney *v.* Atkins, 151 App. Div. 309.)

TITLE 6.—BALLOTS MARKED IN TWO OR MORE CIRCLES

Except in exceptional cases, a ballot marked in two circles is void. A voter cannot vote two tickets. The

election law provides, however, that, where a voter marks a ballot in more than one circle, his vote may be counted for such candidate on one ticket as has no opponent on the other (Sec. 368, rule 6). Thus, where the name of a particular candidate appears on two tickets so marked in the circle, the ballot must be counted for him. (People *ex rel.* Feeny *v.* Board of Canvassers, *supra*, 41; Matter of Fallon, Baliots 111, 120; but see Ballot 143, *contra.*) Similarly, where the name of a particular candidate appears on one ticket and there is no nomination on the other, the ballot must also be counted for him. (Matter of Fallon, Ballots 34, 51, 113, 164; but see Ballot 101, *contra.*)

Matter of Jerome (48 Misc. 441) presented a somewhat different question in that District Attorney Jerome's name was the only name in his column, so that the specific intention to split a party vote for him was as indubitably expressed by making a mark in the circle above his name as by making it in the voting space before his name and the court (Giegerich, J.) held either method equally valid, basing its opinion on the argument that the provision that "if it is impossible to determine the elector's choice his vote shall not be counted" (Sec. 368, rule 7) implies that where it is possible to determine such choice, such determination should be made accordingly. Indeed, the court went even further and held the voter could mark a Jerome ballot both ways and the extra cross would be surplusage (Fig. 27). The most radical decision of all is one holding that, if a voter marks in two party circles, but, in addition, makes a voting mark for a candidate for some office on one of such tickets, his vote may be counted for the candidate so indicated, although he has an opponent on the other ticket. (People *ex rel.* Moran *v.* Sniffin, 123 App. Div. 730. See *contra*, Matter of Holmes, 30 Misc. 127.)



Valid Jerome Ballot, marked in two circles, with three marks.

Fig. 27.

INDEPENDENT NOMINATIONS.

MUNICIPAL OWNERSHIP LEAGUE.

X	For Mayor, WILLIAM RANDOLPH HEARST.
X	For Comptroller, JOHN FORD.
X	For President of the Board of Aldermen, JAMES G. PHELPS STOKES.
X	For Justice of the Supreme Court for the First Judicial District, SAMUEL SEABURY.
X	NO NOMINATION.
X	NO NOMINATION.
X	For Judge of the Court of General Sessions of the Peace, JOHN PALMIERI.
X	For Sheriff, JOSEPH W. CODY.
X	For County Clerk, J. FAIRFAX McLAUGHLIN.
X	For District Attorney, CLARENCE J. SHEARN.

"No Nomination ballot," formerly void, but validated by the Levy Law of 1911.

Fig. 28

TITLE 7.—NO NOMINATIONS

The provisions relating to the form of general ballots provide that when no nomination has been made by a political party for an office to be filled at election, the title of such office shall be printed in such party column, and underneath such title shall be printed, in brevier capital type, the words "no nomination" (Sec. 331). In People *ex rel.* Feeny *v.* Board of Canvassers (156 N. Y. 36), the court of appeals held that a voting mark in the voting spaces to the left of these words could not have been made in any legal sense for the purpose of voting, and rendered the ballot void, and, in the Hearst-McClellan recount, a considerable number of voters who voted down the line of voting spaces, instead of voting in the party circle, made voting marks in the voting spaces to the left, opposite the words "no nomination" (See Figure 28), and Judge Lambert uniformly declared such ballots to be void (Judge Lambert's Rulings, *supra.*) The legislature of 1911, however, amended the law so as to validate a ballot bearing such crosses (Levy law) and the law now reads that such crosses shall be regarded as surplusage (Sec. 368, rule 10).

TITLE 8.—BALLOTS DEFECTIVELY PRINTED

The effect of defects in printing the ballot has already been considered in connection with printing the ballot (*ante*, p. 54).

ARTICLE XI

TOWN MEETINGS

The election law at one time was not generally applicable to town meetings. (Matter of Larkin, 163 N. Y. 201.) As now written, however, it contains many ref-

erences to towns, town offices and town meetings (Secs. 45, 122, 132–3, 183, 296–8, 311–2, 316, 318, 332, 340–1, 393, 419); and the town law expressly provides that it shall be applicable (Town Law, Articles 25–31).

ARTICLE XII

VILLAGE ELECTIONS TO DETERMINE PROPOSITION FOR INCORPORATION

The village law contains special provisions for elections to vote upon a proposition to incorporate (Secs. 2–20), including an appeal to the appellate division, which may set aside an election. (Sec. 18; Matter of Village of Webster, 102 App. Div. 202.) Under a former statute, a second election was a finality (People *v.* Snedeker, 160 N. Y. 350); but the present law permits any number of elections and appeals (Sec. 20).

ARTICLE XIII

SOLDIERS AND SAILORS ELECTIONS IN TIME OF WAR

Whenever, in time of war, any qualified voter is in the actual military service in the army or navy of the State or of the United States and by reason thereof absent from his election district, he shall be entitled to vote as fully as if he were present at his place of residence (Sec. 500). Polls are held at the quarters of an officer (Sec. 507) and the voter votes an official war ballot (Sec. 503).

ARTICLE XIV

VOTING MACHINES

The board of elections of the city of New York and the common council of any other city, the town board of any town, or the board of trustees of any village, may adopt voting machines for use at general elections (Sec. 393). A state board of voting machine commissioners, appointed by the governor (Sec. 390), must examine, on application, any proposed voting machine and report on its accuracy, efficiency and capacity to register the will of voters; and if their report states that the kind of machine so examined can be safely used by voters at elections, under the conditions prescribed in the election law, it shall be deemed approved. No form of machine not so examined and approved can be used (Sec. 391). A form of voting machine to be approved must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations. It must be provided with a single straight ticket device for each party, must also permit the voter to vote for any person for any office, whether or not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy (Sec. 392). The provisions of the election law relating to elections apply as far as practicable to voting by voting machines (Sec. 417), but the law contains a good many provisions applying specially to voting by voting machines (Secs. 390–421).

The authorities of any city, town or village authorized to adopt a voting machine may provide for the experimental use of a machine at an election in one or more districts, without a formal adoption thereof, and its use at such election shall be valid (Sec. 394).

The courts are reluctant to attempt to interfere to regulate the use of voting machines. (People *ex rel.* Hotchkiss *v.* Corwin, 152 App. Div. 920.)

ARTICLE XV

OFFICERS

TITLE 1.—OFFICERS ENUMERATED. RELATIVE FUNCTIONS

The election law provides for state superintendents of elections, their deputies and other subordinates, for boards of election, consisting of commissioners of election, and for their subordinates, for election officers, consisting of inspectors of election, poll clerks and ballot clerks, and for watchers and challengers.

The superintendents of election and their deputies constitute what amounts to a state elections constabulary, possessing and exercising, among other police powers, all the powers exercised by a sheriff.

The boards of election, on the other hand, are executive or administrative bodies, charged with the duty of executing the election laws.

Inspectors of election, poll clerks and ballot clerks are the "election officers" immediately in charge of the polling place.

TITLE 2.—STATE SUPERINTENDENTS OF ELECTION

Historical: The office of state superintendent of election is political in its origin and existence. Its jurisdiction and duties, to a great extent, overlap the jurisdiction and duties of the boards of election and the police. It was the republican legislature of 1898, at an extraordinary session, which first legislated on the subject, by creating the

normally democratic counties of New York, Kings, Queens, Richmond and Westchester to be a new "metropolitan elections district" and creating a new officer, a "state superintendent of elections for the metropolitan district" to police the new district so created. (Laws of 1898, Chap. 676; Morgan *v.* Furey, 186 N. Y. 202.) This legislation gave to the republican party a certain political control of elections in the new metropolitan district. The condition continued until the year 1911, when a democratic legislature was elected, and, thereupon, that legislature made the law state-wide and increased the jurisdiction of the office to include primary elections (Sec. 489) and made a substantial increase in the number of superintendents and deputies. The law, as thus amended, now provides for three superintendents appointed by the governor for terms of four years each; three chief deputies, appointed by the superintendents, without nomination (Sec. 471); four hundred deputies nominated locally by the parties entitled to representation on the local boards of election (Sec. 473); and one hundred and seventy-five additional deputies (Sec. 474), a secretary and necessary clerks, stenographers, and other employees appointed without nomination (Sec. 471).

Superintendents: The superintendents and each deputy possess and exercise all the powers vested in a sheriff, as a conservator of the peace, either by statute or common law (Sec. 472). The superintendents have direction and control of all deputies and must assign them to election districts (Secs. 475, 479) and may make rules for their control and conduct (Sec. 475). The superintendents, or any deputy, may call on any person or public officer to assist them in the performance of their duty (Sec. 476). Any superintendent may issue subpœnas, including subpœnas *duces tecum*, for the purpose of investigating any matter within his jurisdiction and of aiding in enforcing

the provisions of the law (Sec. 477). The affidavit of a superintendent or deputy is made presumptive evidence under certain circumstances (Sec. 153; Matter of Morgan, 114 App. Div. 45.) Any superintendent or chief deputy and not more than ten designated deputies may administer oaths and affirmations (Sec. 478). Any superintendent may attend at any election and each deputy, on election day, must attend the election at the polling place to which he is assigned. The superintendents and each deputy must be admitted at any time within any polling place and within the guard-rail thereof. It is the duty of the superintendents and of each deputy, during the election, to preserve order and to arrest any person violating or attempting to violate the law (Sec. 479).

Lodging Houses, Dwellings, Hotels: The superintendents are also vested with broad supervisory powers over lodging houses and hotel keepers. In this connection, the law calls for elaborate reports to be made by lodging houses and hotel keepers (Sec. 480), affidavits by hotel keepers holding liquor licenses (Sec. 481), reports by police and certain departments (Sec. 483), and lists to be furnished by the owner or lessee of any hotel or inn containing less than fifty rooms, and every lodging house or dwelling (Sec. 484). The scope of these reports, affidavits and lists is indicated by the requirements of the reports to be made by lodging house and hotel keepers, which must state, among other things, the names of all persons living therein who claim a voting residence thereat and their color, age, height, weight, color of hair, marks on face or hands, complexion and any other distinguishing marks, and their birth place, occupation, place of business and room, and the signature of each such person (Sec. 480).

The superintendents are also required to keep a card index of registered voters, prepared by the various inspectors of election at the time of registration (Sec. 485).

Clerks: Clerks are given power, when directed by the superintendents, to administer oaths and affirmations (Sec. 472).

Deputies: The four hundred deputies appointed by nomination, in addition to possessing the powers of a sheriff (Sec. 472) and preserving order and making arrests at the polls at general elections (Sec. 479), are given broad powers of arrest without warrant, execution of warrant, and of investigation and inspection, including, for instance, the right, when directed by a superintendent, or on their own motion, to visit and inspect any house or dwelling and interrogate any inmate (Sec. 475). This right of inquisition, however, can only be exercised for investigating registration, so that, before registration, an inmate of a lodging house may properly refuse to answer such a simple question as "Are you married?" (People *v.* Carleton, 41 Misc. 523.) Deputies cannot attend at primaries except for the purpose of voting (Sec. 489). A deputy must possess the qualifications of election officers (*post*, p. 129), except that he need not be a resident of the election district in which he serves. The one hundred and seventy-five deputies, appointed without nomination, have the same powers and duties as the other deputies, except that they are not entitled as such to attend at the polling places on election day (Sec. 474). Members of the four hundred deputies can only be removed for cause (Sec. 486), the others at pleasure (Sec. 474).

Liability: A superintendent is not liable for directing a deputy to present an information to a magistrate, who issues a warrant thereon, without requiring sufficient proofs, so that an innocent citizen is wrongfully arrested. The superintendent could not assume that the magistrate would act without jurisdiction. (Tanzer *v.* Breen, 139 App. Div. 10.)

TITLE 3.—BOARDS OF ELECTION

The law provides for a board of elections, consisting of four commissioners, for the city of New York, and for a separate board of elections, consisting of from two to four commissioners for every other county (Sec. 190, as amended by Laws of 1913, Chap. 800). Each board must be bipartisan (Constitution, Article 2, Sec. 6; Election Law, Secs. 190, 196), and is charged with the duty of executing the laws relating to all elections held within their respective cities or counties (Secs. 190, 206).

In New York City, the board of aldermen appoints the board of elections; elsewhere, the board of supervisors (Sec. 191). These appointments are made upon recommendation of the two political parties which cast the highest and next highest vote for governor at the last election (Secs. 194–5). A commissioner must be a resident and elector of the political subdivision for which he is appointed and is disqualified from being a candidate for any elective office during his term of office (Sec. 191).

At their first meeting, the commissioners organize as a board by electing a president and secretary. Each board has power to adopt rules and regulations for the transaction of its business and for the control and conduct of its officers and employees (Secs. 192, 207). It fixes the number, salaries, duties and rank of its chief clerks, clerks, assistant clerks and stenographers, and appoints and removes at pleasure and fixes the salaries of all its employees, but with certain limitations and exceptions (Secs. 190, 197, as amended by Laws of 1913, Chap. 800). It is the custodian of primary records (Sec. 202). Its offices are public and open every business day, during hours designated by it (Sec. 207). On the last day to file certificates of nomination, it is a commendable practice to keep the office open until midnight. (Matter of

Norton, 34 App. Div. 79, appeal dismissed 158 N. Y. 130.) All records in its offices are public and open for inspection and for the making of copies. Minutes of all its meetings must show how each commissioner voted upon any resolution or motion (Sec. 208).

Police: The police, from the commissioner to members of the force, whenever called upon by the board, must render it all possible assistance; and the commissioner, upon written request, must detail to its service such patrolmen and other police as may be necessary (Sec. 199).

TITLE 4.—ELECTION OFFICERS

There must be, in every election district, the following "election officers": four inspectors, two poll clerks, and two ballot clerks (Sec. 302), who shall serve at every primary (Sec. 70), general, special or other election held within their districts during their term of office. The term is one year, except for inspectors in towns, where it is two years (Sec. 302).

Qualifications: Each class of officers must be bipartisan (Constitution, Article 2, sec. 6; Election Law, sec. 302). Their qualifications are as follows: Qualified voter of the county, if in New York City; or of the city, if in any other city, or of the election district of the town in which he is to serve. Good character. Able to speak and read English understandingly and write it legibly. General knowledge of the duties of the office. There are also a number of disqualifications (Sec. 302).

Appointment: In New York City, the board of elections and, in other cities, the mayor and, in towns, the town board (Sec. 311) appoints the election officers (Secs. 303, 306). This is done on nomination by the parties (Secs. 303, 304, 306), except that in towns the inspectors, upon appointment, in turn appoint the poll clerks and

ballot clerks (Sec. 312). The nomination by parties is made by filing party lists, duly authenticated. If two factions of the same party file lists, the law provides for preference to the faction recognized by the state convention or state committee (Sec. 304); but it seems that a primary election must be regarded as even more authoritative recognition. (People *ex rel.* McCarren *v.* Dooling, 128 App. Div. 1, affirmed, 193 N. Y. 604.) Each person proposed for appointment must take an examination, unless he has served at any previous election (Sec. 305).

Vacancies and Absentees: The law suitably provides for supplying vacancies and absences of inspectors, poll clerks and ballot clerks. The power of appointment is vested in one of the remaining officers of the same political faith and the appointee must also be of the same political faith and a qualified voter of the district. If an inspector is absent, the remaining inspector appoints. If both inspectors, the poll clerk, or if he also is absent, the ballot clerk. If a poll clerk or ballot clerk is absent, the two inspectors appoint (Sec. 313).

Removal: In cities of the first class, the board must remove an election officer, without charges or notice, upon the written request of the official of the party who certified such officer's name; otherwise election officers cannot be removed except for cause and after notice, unless for improper conduct as an election officer when actually on duty (Sec. 308).

Transfer Prohibited: No election officer may be transferred from one election district to another after he has entered upon the performance of his duties; and no election officer may serve in any county save that in which he resides (Sec. 308).

Inspectors: Inspectors act as a board of registry at registration, as a board of inspectors during primary and general elections, and as a board of canvassers at the close

of the polls (Sec. 314). They appoint one of their number chairman (*ante*, p. 84) and determine questions by majority vote (Sec. 314). They act ministerially, never judicially (*ante*, p. 16). All meetings of inspectors must be public. Each individual inspector, however, has full authority to preserve peace and order at any meeting and at elections and to enforce obedience to his commands; and may appoint one or more voters to assist him in so doing. Any inspector may order the arrest of any person other than an election officer violating or attempting to violate the law (Sec. 315). The inspectors, however, under the pretense of keeping order, cannot turn out a peaceful and quiet citizen whose presence does not interfere with the discharge of their duties. (Horton *v.* Whister, 4 State Rep. 810.)

Poll Clerks: Each poll clerk keeps a poll book for keeping the list of voters voting or offering to vote at elections and performs certain other incidental duties. During the canvass, they make and complete the tally sheets (Sec. 355). Poll clerks also officiate at primary elections (Sec. 78).

Ballot Clerks: The duty of ballot clerks is to take charge of the ballots. They deliver the ballots to the voters (Sec. 354). They also prepare and sign a written statement or return of ballots, to be attached to the statement of canvass, accounting for the full number of ballots received, whether cancelled, spoiled and returned, unused or actually voted (Sec. 337).

TITLE 5.—WATCHERS

At primary elections, any political party or any two or more candidates may appoint one watcher for each election district. Any person, apparently, is qualified to act as such a watcher (Sec. 84). On registration days and

also at general elections, each political party or independent body may appoint as many as two watchers for each election district. Such watchers must be qualified electors of the county in which the election district is located (Secs. 152, 352). At all elections, before any ballots are received, watchers are entitled to have the boxes examined in their presence (Secs. 84, 350). They may be present and within the guard-rail (Secs. 83, 84, 351) until after the completion of the canvass (Secs. 84, 88, 352). On registration days, they are also entitled to be present until the end (Sec. 152). At all elections, during the canvass, they are entitled to carefully read and examine any and all ballots (Secs. 85, 370), and at primary elections, after the canvass, they are entitled to reasonable opportunity to make a transcript of any statement of result (Sec. 88).

TITLE 6.—CHALLENGERS

At primary elections, any three or more candidates of each party are entitled to at least one challenger (Sec. 84) and at general elections, each party or independent body is entitled to at least one challenger (Sec. 352). Any person apparently is qualified to act as a challenger at primary elections, but, at general elections, a challenger must be a qualified elector of the county in which the election district is located (Sec. 352). At both primary and general elections, challengers are entitled to remain just outside the guard-rail where they can plainly see what is done within the rail, outside of the voting booths, from the opening to the closing of the polls (Secs. 84, 252).

ARTICLE XVI

CORRUPT PRACTICES LAW

The election law makes elaborate provision for regulating the use of funds at both primary and general elections (Secs. 540–562).

Candidates: A candidate, in any event, must file with the secretary of state a statement of any contributions made by him (Sec. 542). He must also file a statement required by the penal law (*post*, p. 173).

Political Committees: Political committees are defined so as to include any combination of three or more persons co-operating to aid or to promote the success or defeat of a political party or principle, or of any proposition, or to aid or take part in the election or defeat of any candidate (Sec. 540). Every political committee shall have a treasurer, and must file with the secretary of state a statement of his name and address, signed by three members of the committee, within five days after he is chosen (Sec. 453). After election, the treasurer must file a statement of campaign receipts and payments (Sec. 546). This statement is a summary of the financial business of the committee and need not contain the "detailed accounts" of moneys required to be made to him of moneys received from him. (Matter of McLennan, 65 Misc. 644, affirmed on opinion of Andrews, J., below, 142 App. Div. 926, affirmed 204 N. Y. 608.) Any person, including a candidate, who gives, pays, expends or contributes, or promises so to do, any money or other valuable thing in connection with elections, except to a political committee or one of its members, or to a candidate or to duly authorized agents of such committee or candidate, must file a similar statement, and is made subject to all the duties required of a

political committee or the treasurer thereof (Sec. 541). The secretary of state must provide suitable blank forms (Sec. 549).

Contributions: Campaign contributions must be made under the true name of the contributor (Sec. 547).

Payments. Vouchers: All payments required to be accounted for, unless the total expense payable to one person be not in excess of five dollars, must have a receipted voucher stating the particulars of expense, and all such vouchers must be preserved for fifteen months after the election to which they relate (Sec. 545).

Use of Party Funds at Primaries: The law contains an express prohibition against the use of party funds in connection with primary elections, but renders it ineffective by numerous exceptions authorizing such use for many purposes, including the general purpose "legitimate expenses." (Sec. 562).

Part Third

PROCEDURE

ARTICLE I

VARIETIES OF PROCEDURE IN ELECTION CASES

The judicial branch of government may take jurisdiction to decide test questions of election law long in advance of elections and may also retain jurisdiction to decide abstract questions long after its decision in the particular case has become academic. The judicial branch may act through any one of the courts or through a justice thereof. The form of its procedure may be a summary proceeding or it may be in the nature of a suit at common law for damages, or the more elaborate procedure of quo warranto, mandamus, habeas corpus or certiorari. In considering these various questions, the time of making decisions will first be taken up and then the various methods of procedure. For the purpose of convenience, however, the tribunal, whether a court or a justice, will be uniformly referred to as a court.

ARTICLE II

DECISIONS AS AFFECTED BY POINT OF TIME

Title 1.—Proceedings for Instructions Prior to Controversy

Ordinarily, the courts do not assume jurisdiction to decide questions in advance of some action, taken or

refused, actually involving the rights of persons interested in the question sought to be determined; but, if a question relates to the duties of public officers in matters of a public nature, the courts will assume jurisdiction in exceptional and extraordinary cases, to decide important questions of election law in advance of an actual controversy. (People *ex rel.* Hotchkiss *v.* Smith, 206 N. Y. 231; State *ex rel.* Morris *v.* Wrightson, 56 N. J. L. 126.)

TITLE 2.—DECIDING QUESTIONS NOT MATERIAL TO CONTROVERSY

The courts have even gone so far in an important case as to decide on a preliminary motion for a bill of particulars, questions which could only arise upon the trial. (People *v.* McClellan, 191 N. Y. 341.) In the case cited, Gray, Vann and Werner, JJ., dissented and insisted that the "undoubted importance" of the case "furnishes no reason to assume a function, which, in a less important case, it would unhesitatingly declare improper to exercise."

This is consonant with the well settled rule that courts will not inquire into the constitutionality of an act of the legislature until a concrete case arises in which a decision of such question is unavoidable for the determination of the case itself. (Hanrahan *v.* Terminal Commission, 206 N. Y. 494, 504.)

TITLE 3.—ABSTRACT QUESTIONS AFTER CONTROVERSY ENDED

The general practice of the courts is to refuse to decide abstract questions after the question involved has become abstract by lapse of time (People *ex rel.* Geer *v.* Common Council, 82 N. Y. 575; Matter of Manning, 139 N. Y. 446; Matter of Norton, 158 N. Y. 130; Croker *v.* Sturgis, 175 N. Y. 158, 163); but the courts will ordinarily decide a

question relating to the election law, even after the election to which it relates has been held. (Matter of Gage, 141 N. Y. 112; Matter of Madden, 148 N. Y. 136, 139; Matter of Fairchild, 151 N. Y. 359, 361; Matter of Social Democratic Party, 182 N. Y. 442; People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670, 671; Matter of Titus, 117 App. Div. 621, affirmed 188 N. Y. 585; Schieffelin *v.* Britt, 150 App. Div. 568.)

TITLE 4.—PROMPT DETERMINATIONS

It is the duty of courts and judges entertaining proceedings under the election law to speedily decide the questions presented to them. (Matter of Hennessy, 164 N. Y. 393.)

ARTICLE III

SUMMARY PROCEEDINGS

TITLE 1.—IN GENERAL

The election law provides for a variety of summary proceedings. These are founded on separate provisions of the statute, which vary in their terms as to the particular court or justice to whom the application shall be made, the party entitled to make the same, the notice that must be given, how such notice must be served and many other particulars. In considering them, the substance will be given, and the reader can readily secure such additional detail as he may require by referring to the particular section cited in each instance. It should be borne in mind, however, that these various summary proceedings are statutory, dependent upon special provision of law, and where the legislature decrees that jurisdiction shall be obtained only in a certain way, that

way must be followed to the exclusion of all others, and unless it is, the service made is ineffectual for any purpose. (Eisenhofer *v.* New Yorker Publishing Co., 91 App. Div. 94.)

The courts have recognized the confusion created by the number of varying provisions and hold that the mere fact that the moving party refers to the wrong section is immaterial and a case will be disposed of in accordance with the facts as they appear. (Matter of Haugh, 141 App. Div. 26.)

TITLE 2.—ENROLLMENT

Improper Denial of Enrollment: Where a board improperly refuses to enroll a voter, he is entitled to a writ of mandamus. (Matter of Guess, 16 Misc. 306.)

Voter's Inadvertence: Prior to 1912, a voter who enrolled with the wrong party had no redress (Jackson *v.* Britt, 147 App. Div. 87; People *ex rel.* Smith *v.* York, 34 Misc. 120), but an amendment enacted in 1912 authorizes a voter who has been enrolled with the same party for five years and enrolls with another party by inadvertence to correct his enrollment by filing a declaration in a prescribed form (Sec. 14a, added by Laws of 1912, Chap. 52).

Review of Enrollment: The law provides for summary proceedings to review enrollment both in cases of false statements, death or removal from the election district (Sec. 23) and cases where claim is made that an enrolled voter is not in sympathy with the principles of the party with which he is enrolled (Sec. 24). The right to institute either proceeding is given to any enrolled voter of the same political party residing in the assembly district in which the election district, whereat the voter proceeded against is enrolled, is located. In the first class of cases, the application is made directly to the court; in the latter, to the chairman of the county general committee, who hears the

matter and, if it appears by sufficient evidence that the person is not in sympathy with the principles of the party, files a certificate with the board of elections, setting forth the reasons why the voter's name should be stricken from the enrollment book; and it thereupon becomes the duty of the board of elections to make application to the courts. In either class of cases the court, after notice, makes such final order as the facts warrant.

Evidence: The provisions requiring "sufficient evidence" in cases of alleged death or removal from the election district must be strictly complied with. (Matter of Titus, 117 App. Div. 621, Matter of O'Brien, 117 App. Div. 628; Matter of McGuire, 117 App. Div. 637, all affirmed 188 N. Y. 585; Matter of Heineman, 124 App. Div. 918.)

Notice: An order to show cause why a voter's name should not be stricken from the enrollment book must be returnable on a day at least ten days before a primary election and a copy thereof served on the person proceeded against either personally or by mail and on the board of elections "at least forty-eight hours before the return thereof." Any number of hours less than forty-eight hours is insufficient. (People *ex rel.* Clancy *v.* Bingham, 123 App. Div. 226; Matter of Striking 539 Names from the Enrollment Books of the 29th Assembly District, Law Journal, September 13, 1909.)

Error: Where application is made to strike a name from the enrollment of a given year, it is fatal to refer to such enrollment as the enrollment of the year previous, although made in that year. (Matter of Watson, 193 N. Y. 612.)

TITLE 3.—MEMBERSHIP OF PARTY COMMITTEES

Elections: The election law provides that the election of members to any party committee may be reviewed by

summary proceedings upon the petition of any person qualified to vote at the primary election of the party which such committee represents (Sec. 39).

Removals: The law also provides for summary proceedings to review the action of any committee in removing one of its members. Such application is by petition of the person so removed (Sec. 40).

TITLE 4.—CONVENTIONS AND PRIMARIES

Any action or neglect of the officers or members of a political convention or committee, or of any inspector of primary election, or of any public officer or board with regard to the right of any person to participate in a primary election, convention or committee, or to enroll with any party, or with regard to any right given to or duty prescribed for, any voter, political committee, political convention, officer or board, is reviewable by summary proceedings upon the petition of any person aggrieved thereby or upon petition presented by the chairman of any political committee. The court should consider, but need not be controlled by, any action or determination of the regularly constituted party authorities upon the questions arising in reference thereto, and shall make such decision and order as, under all the facts and circumstances of the case, justice may require. The action of any custodian of primary records in canvassing and certifying the result of any primary election, or of the secretary of state in preparing and certifying the list of delegates to any convention or members of a state committee may be reviewed in like manner. The court may subpœna or examine witnesses or in its discretion hear and determine the case on affidavits. In case a court should find and determine that both parties to a controversy have been guilty of frauds or that a primary or convention has

been so permeated by fraud as to render it impossible to determine the true result thereof, it may direct the holding of a new primary or the reassembling of the convention (Sec. 56).

Fraud in a Designation: The law does not appear to contain any provision authorizing the courts to go behind a designation valid on its face, even upon proof of false acknowledgments. (Matter of Salter, 76 Misc. 33.)

Prima Facie Case: In attempting to review a primary election, the moving party must make out a case, and even where gross frauds and irregularities are charged and feebly and unconvincingly denied, no case is presented if it is reasonably clear that the acts complained of could not have affected the result and at most served only to swell the apparent majority of the successful candidate. (Matter of Coughlin, 198 N. Y. 613, affirming 137 App. Div. 283, on opinion of Scott, J., below.)

Relief Granted: In the case of another primary election, one held at Watervliet in 1905, where the brother of one of the candidates acted as chairman of the board, kept the boxes on the floor, permitted ballot stuffing and, after his brother's votes had been counted, apparently welcomed a brick which arrived through the window and was succeeded by darkness, thereby ending the counting of the opponent's votes, the court ordered a new primary election. (McLaughlin *v.* Connors, 185 N. Y. 545.) In other cases, the courts have gone even further and after setting aside a certificate of election already issued have summarily determined that another candidate is entitled thereto and directed the issuance of a certificate to him. (Rabbitt *v.* Garand, 89 App. Div. 119; Walsh *v.* Church, 115 App. Div. 82.)

Time for Recanvass: The courts, however, will not review a primary to elect delegates after the delegates have actually met in convention and made nominations.

(Matter of Cragg, 121 App. Div. 921; Matter of Lazarus, 140 App. Div. 406; Matter of Orgel, 140 App. Div. 410.)

Scope of Review: Under the law as it read prior to 1911, the jurisdiction of the courts was held to be limited, relating solely to matters within the jurisdiction of the board whose action was being reviewed. (Matter of Hines, 141 App. Div. 569.) For instance, the courts held they could not review the action of a board which declined to add together the votes for a candidate apparently voted for under two different names. (People *ex rel.* Calihan *v.* Hunt, 75 App. Div. 33.) The legislature of 1911, however, revised and liberalized the provisions on this subject (Laws of 1911, Chap. 891) and the decisions cited have been held to be no longer binding. (Matter of Zimmer, 77 Misc. 336, Pooley, J.)

TITLE 5.—CERTIFICATES OF NOMINATION. NAMES AND EMBLEMS

Any question arising with reference to any emblem or to any name designated in any certificate of nomination or with reference to the construction, sufficiency, validity or legality of any certificate may be determined by the court upon the application of any citizen (Sec. 125). Any questions raised by objections filed to a certificate of nomination may be heard and determined in the same manner (Sec. 134). If the certificates of nomination of two or more different parties or independent bodies designate the same or substantially the same emblem or party name, the court must decide which party or independent body is entitled to the use thereof, being governed as far as may be in its decision by priority of designation in the case of the emblem, and of use in the case of the party name. If there be a division within a party, and two or more factions claim the same or substantially the same emblem or name, the court must decide between

such conflicting claims, giving preference of emblem and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities (Sec. 125).

Scope of Proceeding: This proceeding cannot be invoked to determine the qualifications of a candidate. (Matter of Independent Nominations, 186 N. Y. 266, 279.)

Reform in Procedure: The present statute was enacted in 1911 and marked a distinct reform in procedure (Laws of 1911, Chap. 649, Levy law). Under the former practice, application had to be made, in the first instance, to a board of elections, which had but a brief time to decide the questions before it. The board in New York City was frequently compelled to sit all night and day and, even then, it frequently decided important questions, on partisan lines, by agreeing to disagree, voting two and two, and throwing a mass of undigested litigation into the courts at the eleventh hour and barely permitting a decision by any appellate court in sufficient time to allow the printing of the ballots. The Levy law eliminated this preliminary hearing by boards of elections and provided for orderly proceedings in the courts which afford reasonable time for an appeal and the printing of the ballots.

Final Order: The provision that the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies is not mandatory. (Matter of Emmet, 150 N. Y. 538; Matter of Hennessy, 164 N. Y. 393; Matter of Herman, 108 App. Div. 335, affirming for reasons stated by Stover, J.).

TITLE 6.—REGISTRATION

The election law provides for summary proceedings to be made not later than fifteen days before election to direct inspectors of any election district to convene as a

board of registration on the second Saturday before election, to place upon the register the name of any person entitled to have his name placed thereon omitted through the fault, error or negligence of the election officers, or to strike from the register the name of any person who will not be qualified to vote in such election district at the election for which registration is made. The latter application may be made by any elector of the town or city in which the election district is located (Sec. 153).

An application to add a voter's name cannot be made after the last day of registration on the ground that he has registered in the wrong district. This is not "through the fault, error or negligence" of the "election officers," that is, of the *right* district, but is through his own negligence, concurred in by the inspectors of the wrong district. (Matter of Hart, 25 Misc. 93, Gaynor, J.).

Where an application is made to strike names from the register, an affidavit by any superintendent of elections, or by any deputy duly deputed for that purpose, stating certain facts specified in the law, is presumptive evidence against the right of the voter to register from such premises (Matter of Morgan, 114 App. Div. 45); but no application to strike a name from a register will be granted in a case of doubt, nor in one resting in some uncertainty or dependent upon inferences of a debatable character, but only in a case in which the facts show affirmatively that the intending voter is not and cannot become qualified. If there is a dispute about the facts or ground for differing inferences the court should not interfere, but leave the voter to swear in his vote at his peril, taking upon himself the risk of his persistence. (Matter of Goodman, 146 N. Y. 284; Matter of Jacobs, 45 Misc. 113).

TITLE 7.—OFFICIAL BALLOTS

Upon affidavit, presented by any voter, that an error or omission has occurred in the publication of the names or description of the candidates nominated for office, or in the printing of sample or official ballots, the court may make an order requiring the board charged with the duty in respect to which such error or omission occurs to correct such error, or show cause why such error should not be corrected. Such board, upon its own motion, must correct, without delay, any patent error in the ballots which it may discover, or which shall be brought to its attention, and which can be corrected without interfering with the timely distribution of the ballots to the inspectors for use at such election (Sec. 344).

TITLE 8.—CORRUPT PRACTICES ACT

If any person or committee fails to file a statement or account required by the corrupt practices act or files a statement which does not conform to the requirements thereof in respect to its truth, sufficiency in detail, or otherwise, or if any person or committee has failed to comply with any other of the requirements of the act, the court by order in proceedings for contempt may compel such person or committee to file a sufficient statement or account, or otherwise comply with the provisions of the act. The applicant for such an order must present a written petition (Sec. 550; see Matter of Lance, 55 Misc. 13). The application may be made by the attorney-general, district-attorney, a candidate, or by any five voters who voted at the election (Sec. 551).

ARTICLE IV

MANDAMUS

TITLE 1.—ENROLLMENT

Mandamus is a proper remedy to compel a board to enroll a duly qualified voter. (Matter of Guess, 16 Misc. 306.)

TITLE 2.—ACCEPTANCE OF VOTE

Mandamus is a proper remedy to compel inspectors of election to allow a duly qualified and registered elector to vote and, in fact, is regularly issued for that purpose. (People *ex rel.* Borgia *v.* Doe, 109 App. Div. 670.) The voter, however, must show that he is qualified. (People *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.)

TITLE 3.—RECOUNT AND PRESERVATION OF BALLOTS

The Statute: The law provides that ballots declared void and ballots protested as being marked for identification be secured in a separate sealed package and filed with the original statement of canvass (Sec. 373). The other voted ballots must be replaced in the ballot box, which shall be securely locked and sealed. They shall be preserved inviolate for six months after election, and may be opened and their contents examined upon the order of the court (Sec. 374).

Ballots in Boxes: The election law does not authorize a writ of mandamus to recanvass the ballots in the boxes and such a writ does not lie. (People *ex rel.* Brink *v.* Way, 179 N. Y. 174; Hearst *v.* Woelper, 183 N. Y. 274, overruling Matter of Stiles, 69 App. Div. 589; People *ex rel.* March *v.* Beam, 188 N. Y. 266.) The court, however, will

grant a mandamus to compel the inspectors to take void and protested ballots out of the ballot boxes. (People *ex rel.* March *v.* Beam, *supra;* People *ex rel.* Maxim *v.* Ward, 62 App. Div. 531); and if the inspectors have deliberately left the count for an office entirely undetermined, to be determined by the courts, and have replaced the disputed ballots in the box, mandamus lies to compel them to reopen the box and discharge the duties imposed on them by law. (People *ex rel.* Sturtevant *v.* Armstrong, 116 App. Div. 103, following People *ex rel.* Smith *v.* Schiellein, 95 N. Y. 124. See also People *ex rel.* Ranton *v.* Syracuse, 88 Hun, 203.)

Void and Protested Ballots: As to the void and protested ballots, the law expressly authorizes a writ of mandamus upon the application of any candidate within twenty days after election to review the action of the inspectors in counting ballots which were protested and in rejecting other ballots as void. The election boards are continued in office for the purpose of such proceedings. (Sec. 381; People *ex rel.* White *v.* Aldermen, 157 N. Y. 431.)

Mandamus also lies to compel the inspectors to count protested ballots, which, contrary to the requirement of the election law (Sec. 370) they omitted to count. (People *ex rel.* McLaughlin *v.* Ammenwerth, 197 N. Y. 340.)

Mandamus also lies to compel the inspectors to make a true return of the votes as actually cast and counted by them, as where they transposed figures by mistake (People *ex rel.* Henness *v.* Douglass, 142 App. Div. 224), or omitted to give a candidate the votes to which he was shown to be entitled by the unquestioned tally sheet. (Matter of Stewart, 155 N. Y. 545.)

Mandamus also lies in relation to propositions submitted. (Tamney *v.* Atkins, 151 App. Div. 309, overruling People *ex rel.* May *v.* Strang, 137 App. Div. 848.)

Procedure: In order to secure a writ of mandamus, the relator must comply with the appropriate provisions of the code of civil procedure, giving the requisite number of days' notice. He cannot base his application on a petition verified wholly on information and belief. (Matter of Brough, Seabury, J., L. J., December 2, 1910; People *ex rel.* Watkins *v.* Board of Canvassers, 25 Misc. 444; see also People *ex rel.* Perry *v.* Board of Canvassers, 88 App. Div. 185.) A petition for a mandamus should refer to particular election districts and not rest on a general allegation referring to all the election districts in a city. (Matter of Ordway, 118 App. Div. 386.)

Referee: It is questionable procedure to appoint a referee to supervise the recount of void and protested ballots. (Matter of Tompkins, 23 App. Div. 224.)

TITLE 4.—CANVASS

Mandamus may issue to require a county or state board of canvassers to correct errors or to perform its duty in the manner prescribed by law (Secs. 433, 435). Where the board declines, even without any authority, to give a certificate to a candidate who is disqualified, but whose disqualification can only be determined by the legislature, the courts will not grant a mandamus to compel it to give such a certificate, because that, in effect, would be compelling it to do a wrong. (People *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y. 360.)

TITLE 5.—TITLE

Mandamus does not lie to determine title to public office (*post*, p. 156).

TITLE 6.—BY WHOM GRANTED

Unless a statute expressly so provides, a judge at chambers has no jurisdiction to issue a mandamus. (Code Civ.

Pro., Secs. 2068–9; People *ex rel.* Lower *v.* Donovan, 135 N. Y. 76.)

ARTICLE V

CERTIORARI TO REVIEW

The writ of certiorari to review the determination of a body or officer (Code Civ. Pro., Sec. 2120) cannot be invoked to review the acts and conduct of election officers. They are simply ministerial officers. (People *ex rel.* Van Sickle *v.* Austin, 20 App. Div. 1; People *ex rel.* Brooks *v.* Bush, 22 App. Div. 363.)

ARTICLE VI

HABEAS CORPUS AND CERTIORARI TO INQUIRE INTO CAUSE OF DETENTION

TITLE 1.—PROCEDURE

"The writ of habeas corpus and the writ of certiorari to inquire into the cause of detention" (Code Civ. Pro., Chap. 16, Title 2, Article Third, Secs. 2015–2066) are writs to be invoked by a person imprisoned or restrained in his liberty, within the state, for any cause, or upon any pretence, for the purpose of inquiring into the cause of the imprisonment or restraint and of delivering him therefrom (Sec. 2015); except where he has been committed or is detained by virtue of a final judgment, decree or order of any competent tribunal, or by virtue of an execution or other process issued thereon (Sec. 2010; People *ex rel.* Hubert *v.* Kaiser, 206 N. Y. 46). The court, upon application, must issue a writ of habeas corpus (Sec. 2026) and, immediately after the return of the writ, must examine into the facts alleged in the return and into the cause of

the imprisonment or restraint of the prisoner, and must make its final order to discharge him therefrom, if no lawful cause for imprisonment or restraint or for the continuance thereof is shown, whether the same was upon a commitment for an actual or supposed criminal matter or for some other cause (Sec. 2031). If, however, it appear that the prisoner is properly detained, the court must make a final order to remand him (Sec. 2032). Even if a commitment is irregular, the court may remand the defendant or discharge him upon his giving bail, but the irregularity in question must be one of "those practically immaterial errors in the description or nomenclature of the crime or in the form of the warrant, which might well be overlooked when the evidence disclosed the probable commission by the accused of a crime substantially and fairly described in the warrant." (People *ex rel.* Howie *v.* Warden, 207 N. Y. 354.)

In reviewing the action of the minor courts, particularly in election cases, it has become the practice to secure, simultaneously, a writ of certiorari directed to the court to return the information or evidence, and a writ of habeas corpus requiring the production of the relator. This practice is not founded on statutory authority, but is acquiesced in on the ground of convenience. (People *ex rel.* Smith *v.* Van de Carr, 86 App. Div. 9, 12; appeal dismissed, 183 N. Y. 569; People *ex rel.* Clark *v.* Keeper, 176 N. Y. 465, 470.)

Proceedings before an inferior criminal court may be challenged, upon habeas corpus and certiorari, because of an insufficient information, or because of insufficient depositions, or because of an insufficient commitment. When a prisoner is held without authority of law, the proper tribunal will look into the record, so far as to ascertain this fact; and if it be found to be so, will discharge the prisoner. (People *ex rel.* Tweed *v.* Liscomb,

60 N. Y. 559, 572; People *ex rel.* Clark *v.* Keeper, *supra.*) The court hearing the application will be governed by the record, and if it is apparent upon the face of it that the court lacked jurisdiction as a matter of law, the petitioner will be discharged. (2 Spelling on Injunctions and Extraordinary Remedies, 1040, Sec. 1203.)

TITLE 2.—INFORMATION OR DEPOSITIONS

Informations: If an insufficient information is laid before a magistrate he has no jurisdiction to issue a warrant or a subpœna. (People *ex rel.* Livingston *v.* Wyatt, 186 N. Y. 383, 392; People *ex rel.* Brown *v.* Tighe, 146 App. Div. 491.)

"There is some confusion in the authorities as to what an information really is, for the term is frequently used to designate the deposition or affidavit upon which a criminal warrant is issued. The statute itself is not free from doubt upon the subject. An affidavit taken before a magistrate may be full enough to perform the function both of an information and a deposition. This is true when it sets forth facts sufficient to authorize a warrant without further evidence, but when more proof is required and it is necessary to subpœna witnesses and take their depositions, an information is essential. Its office is that of a complaint, as the revised statutes called it. Depositions are the authority for the warrant, as the magistrate must be satisfied 'therefrom,' which refers to depositions only. Something less is required in an information than in a deposition, as otherwise there would be no occasion for the latter. The deposition must set forth facts tending to show that a crime has been committed and that there is reasonable ground to believe that the defendant committed it. While the information need not go so far as the deposition, still it cannot

rest wholly on information and belief, but facts enough must be stated to show that the complainant is acting in good faith and that he has reasonable grounds to believe that a crime has been committed by some person named or described. From all the analogies of the law, both civil and criminal, the information is intended to be made upon oath. While the statute does not expressly require it, we think it is necessarily implied, for otherwise an unfounded accusation could be set on foot and an investigation instituted upon unsupported assertion without any proof whatever." (People *ex rel.* Livingston *v.* Wyatt, *supra.*) Any information which makes a general statement that the prisoner has been guilty of the violation of some general statute, such as the liquor tax law, is insufficient to give jurisdiction. (People *ex rel.* Sandman *v.* Tuthill, 79 App. Div. 24; People *v.* Hiley, 33 Misc. 168.) An information is also void which charges a crime against John Doe and Richard Doe in a case where the prosecutor has particular individuals in mind. (People *ex rel.* Sampson *v.* Dunning, 113 App. Div. 35.)

Depositions: The supreme court, on habeas corpus and certiorari, should discharge a prisoner, where it appears, after an arrest upon a magistrate's warrant, that the depositions upon which the magistrate issued the warrant furnished no legal evidence of the commission of a crime by the relator. (People *ex rel.* Perkins *v.* Moss, 187 N. Y. 412; People *ex rel.* McAuley *v.* Wahle, 124 App. Div. 762.) "If the magistrate issued the warrant of arrest without sufficient evidence in the particular case, the process is a nullity. The question always must be whether the magistrate acquired jurisdiction to cause an arrest of the person, and the court, upon a habeas corpus proceeding, will look back of his warrant and see if the facts stated in the depositions of the prosecutor and his witnesses support his warrant. If they do not furnish reasonable and just

ground for a conclusion that the crime charged had been committed and that the defendant committed it, then jurisdiction was lacking to hold the prisoner in custody for any time." (People *ex rel.* Perkins *v.* Moss, *supra;* Hewitt *v.* Newberger, 141 N. Y. 538; Swart *v.* Rickard, 74 Hun, 339; Tanzer *v.* Breen, 139 App. Div. 10.)

Where the deposition is made upon information and belief, or supposition and belief, a warrant issued thereunder is void. (Blodgett *v.* Race, 18 Hun, 132; approved Swart *v.* Rickard, 148 N. Y. at 269; People *ex rel.* Kingsley *v.* Pratt, 22 Hun, 300, 302; People *v.* Cramer, 22 App. Div. 189; McKelvey *v.* Marsh, 63 App. Div. 396; McCarg *v.* Burr, 106 App. Div. 275, 279; Tanzer *v.* Breen, *supra;* Matter of Lorman, N. Y. L. J., May 13, 1910, Whitney, J.)

An affidavit sworn to before a notary public "is entirely insufficient to authorize a warrant." (People *v.* Nowak, 5 Supp. 239.)

TITLE 3.—COMMITMENT

Upon return of a warrant, if it appear from an examination that a crime has been committed and that there was sufficient cause to believe the defendant guilty thereof, the magistrate must make an order that the defendant be held to answer the same (Code Crim. Pro., Sec. 208). The magistrate, at the time he makes the foregoing order, must also make an order of commitment. From the earliest times, this process was required to contain a statement of the nature of the crime with which the prisoner was charged; if it does not, it is void. (People *ex rel.* Allen *v.* Hagan, 170 N. Y. 46.)

The jurisdiction of an inferior criminal court to issue a commitment may be raised upon habeas corpus and certiorari. Where the insufficiency of the process appears

upon the face thereof, this may be done by demurrer thereto. Where the return sets forth a commitment showing apparent authority in the inferior criminal court, it must be done "by traversing the return and by presenting the information or evidence on which the magistrate acted." (People *ex rel.* Farley *v.* Crane, 94 App. Div. 397, 402; People *ex rel.* Willett *v.* Quinn, 150 App. Div. 813; People *ex rel.* Clark *v.* Keeper, 176 N. Y. 465.)

The question which the court determines is whether there is any evidence to justify the magistrate in making his determination. (People *ex rel.* Bungart *v.* Wells, 57 App. Div. 140, 151; Matter of Henry, 13 Misc. 734.) In People *ex rel.* Farley *v.* Crane, the court said, "The jurisdiction of a magistrate to issue a commitment is properly presented, on habeas corpus or on a writ of certiorari to inquire into the cause of detention, by traversing the return and by presenting the information or evidence upon which the magistrate acted; and if it appears thereby that there is no evidence that the crime charged has been committed by the relator, or that it has been committed, and there is no evidence of reasonable ground for believing that it has been committed by him, he is entitled to his liberty." In People *ex rel.* Bungart *v.* Wells, *supra*, the magistrate made a commitment in an arson case. The relator secured writs of habeas corpus and certiorari. The sheriff returned that he had custody by virtue of the commitment; but he did not return any evidence. The relator traversed the return by denying that it appeared by the evidence that the crime of arson had been committed. The court below sustained a demurrer to this traverse. The appellate division held that this was error, reversed the order and discharged the prisoner. In that connection, the court decided that the traverse was sufficient in form and that a final commitment may be reviewed on *habeas corpus* in order to determine whether

there was any evidence to sustain it. On the latter point, it said, "If the mere commitment were conclusive, then the writ would be largely shorn of its strength. The mere return of the magistrate would make his *ipse dixit* final, no matter how absurd or wicked or wanton his determination, when tested by the facts before him, might be. To hold this, would be to travel backward into another century and to undo the principles of the law and the statutes." It, therefore, follows that, even if the prisoner secures the writ after commitment, the supreme court should discharge him if the record shows that the information or depositions were insufficient. This must be so, because "the question always must be whether the magistrate acquired jurisdiction to cause an arrest of the person." If he did not, "the warrant and all proceedings under it are absolutely void." (People *ex rel.* Perkins *v.* Moss, *supra.*)

Waiver of Irregularities: As to what may constitute a waiver by the prisoner in the criminal court, compare Warner *v.* Perry, 14 Hun, 337, 340; People *ex rel.* Perch *v.* Flynn, N. Y. L. J., August 13, 1909 (Lehman, J.), as against People *ex rel.* Willett *v.* Quinn, 150 App. Div. 813.

Improper Commitment Where Magistrate Has Authority to Convict: In certain special cases in which the powers of the magistrate assimilate with those of a court of record, in that they may not only commit for trial elsewhere, but may actually convict, "it may be that after conviction the evidence may not be examined for the purpose of seeing whether there is any evidence to authorize the conviction" (People *ex rel.* Farley *v.* Crane, 94 App. Div. 397, 402) although, in that case, the court added, "but the question is not presented for decision now." The weight of authority, however, supports the proposition that "upon a commitment in the nature of a final judgment" neither writ acts as a writ of review which

will permit the examination of the evidence to any extent whatsoever. (People *ex rel.* Reynolds *v.* Warden, 44 Misc. 149, 151; People *ex rel.* Kuhn *v.* House of Mercy, 133 N. Y. 207; People *ex rel.* St. Clair *v.* Davis, 143 App. Div. 579. See, however, People *ex rel.* Van Riper *v.* Catholic Protectory, 106 N. Y. 604; People *ex rel.* Danziger *v.* House of Mercy, 128 N. Y. 180, where the court went fully into the question as to whether there was any evidence before the magistrate.)

ARTICLE VII

ACTIONS TO TRY TITLE TO OFFICE

TITLE 1.—EQUITY

A court of equity has no jurisdiction to try the question of title to a public office. (Tappen *v.* Gray, 9 Paige, 507, affirmed 7 Hill, 259; People *ex rel.* Wood *v.* Draper, 24 Barbour, 265; Mott *v.* Connolly, 50 Barbour, 516; People *v.* Albany Railroad, 57 N. Y. 161, 171–2; People *ex rel.* Corscadden *v.* Howe, 177 N. Y. 499; Johnston *v.* Garside, 65 Hun, 208; Moir *v.* Provident Savings Society, 127 App. Div. 591, 601–604; Matter of Hines, 141 App. Div. 569, 574–5; Matter of Sawyer, 124 U. S. 200.) There is some authority, however, for a temporary injunction to protect an incumbent against a contestant pending a proper action. (Seneca Nation *v.* Jimeson, 62 Misc. 91.)

A court will not entertain a taxpayer's suit for an injunction. (Demarest *v.* Wickham, 63 N. Y. 320; Fahy *v.* Johnstone, 21 App. Div. 154.)

TITLE 2.—MANDAMUS

Mandamus does not lie to try the question of title to a public office. (People *ex rel.* Arculariuk *v.* Mayor, 3

Johns. Cases, 79; People *ex rel.* Dolan *v.* Lane, 55 N. Y. 217; Matter of Gardner, 68 N. Y. 467; People *ex rel.* Faile *v.* Ferris, 76 N. Y. 326; Nichols *v.* MacLean, 101 N. Y. 526, 536; People *ex rel.* Nichols *v.* Asylum, 122 N. Y. 190; People *ex rel.* Wren *v.* Goetting, 133 N. Y. 569; People *ex rel.* Lewis *v.* Brush, 146 N. Y. 60; Matter of Hart, 159 N. Y. 278, 161 N. Y. 507; People *ex rel.* McLaughlin *v.* Police Commissioners, 174 N. Y. 450; People *ex rel.* Requa *v.* Neubrand, 32 App. Div. 49; People *ex rel.* Beverforden *v.* Bauer, 137 App. Div. 67.)

TITLE 3.—CODE ACTION IN NATURE OF QUO WARRANTO

Form of Remedy: The question of title to a public office can only be tried in a code action in the nature of quo warranto. (Johnston *v.* Garside, *supra;* People *ex rel.* Wren *v.* Goetting, *supra;* Matter of Hart, *supra;* People *ex rel.* Lazarus *v.* Sheehan, 128 App. Div. 743.)

The writ of quo warranto and proceedings by information in the nature of quo warranto have been abolished, but the relief formerly obtained by means thereof may be obtained by action (Code Civ. Pro., Sec. 1983). It is only the form of the proceeding that is done away with. The jurisdiction and power of the courts are not affected, nor the right to seek and reach, through them, all the remedy which that writ or information once afforded. (People *ex rel.* Hatzel *v.* Hall, 80 N. Y. 117.) The forms of procedure have been changed, but the position of the defendant, and the rules of evidence and the presumptions of law and fact are the same as they were. (People *ex rel.* Judson *v.* Thacher, 55 N. Y. 525.)

Party Plaintiff. The code authorizes the attorney-general to maintain an action, upon his own information or upon the complaint of a private person, against a person who usurps, intrudes into or unlawfully holds or exer-

cises, within the state, a franchise or a public office (Sec. 1948). The attorney-general has discretion to decide whether to bring the action or not (People *ex rel.* Demarest *v.* Fairchild, 67 N. Y. 334), but his decision that an action should not be brought is not binding upon his successor in office. (People *v.* McClellan, 118 App. Div. 177, affirmed 188 N. Y. 618, on opinion of Ingraham, J., below). The action must be brought in the name of the people of the state, and the proceedings therein are virtually the same as in civil suits (Sec. 1984; People *v.* Cook, 8 N. Y. 67). In case the attorney-general brings the action upon his own information, but alleges that the title to the office belongs to some one other than the defendant, such other individual is a necessary party to the action. (People *v.* McClellan, 119 App. Div. 416.) Where the action is brought on the relation or information of a person having interest in the question, the complaint must allege and the title of the action must show that the action is brought upon the relation of that person. In such a case, the attorney-general, as a condition to bringing the action, must require the relator to give satisfactory security to indemnify the people against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person (Sec. 1986).

Trial: The action must be tried by jury (Sec. 1950; Metz *v.* Maddox, 189 N. Y. 460). The court on motion may direct a special jury, if not a struck jury. (People *v.* McClellan, 124 App. Div. 664.)

Burden of Proof. Certificate of Election: In determining the question of burden of proof, it must be borne in mind that the writ of quo warranto was a writ of right for the king, against one who usurps any office or franchise to inquire by what authority he supports his claim. The

king was the fountain of honor, of office and of privilege and, whenever a subject undertook to exercise a public office or franchise, he was, when called upon by the crown, through the writ of quo warranto, compelled to show his title, and, if he failed to do so, judgment passed against him. Thus, in proceedings by information to try title to office, the courts invariably recognized the rule that the burden was upon the defendant to show his right and that, failing to do it, judgment must go against him; and in actions under the code the same rule is enforced. The possession of the office is no evidence of right, but the burden is upon the defendant to show, by affirmative evidence, that his possession is a legal and rightful one. (People *ex rel.* Judson *v.* Thacher, 55 N. Y. 525.) A certificate of the proper authorities certifying to his election is *prima facie* evidence (People *ex rel.* Watkins *v.* Perley, 80 N. Y. 624), but *prima facie* evidence only. (People *ex rel.* Benton *v.* Vail, 20 Wendell, 12; People *ex rel.* Smith *v.* Pease, 27 N. Y. 45; People *ex rel.* Judson *v.* Thacher, *supra.*) Judgment in an action by the people may be rendered against the defendant without adjudging that the title to the office is in the relator (People *ex rel.* Judson *v.* Thacher, *supra*); but between the relator and the defendant, the burden is upon the relator to make out a better title. (People *ex rel.* Watkins *v.* Perley, *supra.*)

Ballots as Evidence: The ballots cast become lawful and proper evidence and neither party can properly be excluded, as for failure to serve a bill of particulars, from the right of availing himself of this evidence upon the trial. Either party may open the boxes without preliminary evidence tending to show misconduct, error, omission or fraud (People *v.* McClellan, 191 N. Y. 341), but preliminary evidence must be given to show that the ballots have been preserved in the boxes inviolate.

(People *ex rel.* Dailey *v.* Livingston, 79 N. Y. 279; People *v.* McClellan, *supra.*)

Scope of Enquiry: Starting with the principle that the election and not the return is the foundation of the right to an elective office, it is competent, in an action to try title, not only to recanvass the ballots in the ballot boxes, but to go behind the ballots and purge the return by introducing oral testimony (People *ex rel.* Stemmler *v.* McGuire, 2 Hun, 269, 274, affirmed 60 N. Y. 640), as, for instance, to prove that votes cast for a candidate of a certain name were cast for a candidate of a not inconsistent name (People *v.* Ferguson, 8 Cowen, 102; People *v.* Seaman, 5 Denio, 409; People *v.* Cook, 8 N. Y. 67); or that improper votes were received and counted which were cast by persons not qualified to vote (People *ex rel.* Smith *v.* Pease, 27 N. Y. 45; People *ex rel.* Judson *v.* Thacher, *supra*); or that proper votes were not recorded on a voting machine. (People *ex rel.* Deister *v.* Wintermute, 194 N. Y. 99. Compare, however, 15 Cyc. 423; N. Y. Cement Co. *v.* Keator, 62 App. Div. 577, affirmed 173 N. Y. 235.)

Direction of Verdict: In an action to try title, the court may direct a verdict for the plaintiff, even though the defendant has a certificate of election, if the plaintiff makes out a *prima facie* case by oral testimony and there is no direct proof to meet it. (People *v.* Cook, 8 N. Y. 67.)

Judgment: Where a defendant is adjudged to be guilty of usurping or intruding into or unlawfully holding or exercising an office, franchise or privilege, final judgment must be rendered, ousting and excluding him therefrom and in favor of the people or the relator, as the case requires, and for the costs of the action. The court, in its discretion, may also award that the defendant pay to the people a fine not exceeding $2,000 (Code Civ. Pro., Sec. 1956).

Subsequent Proceedings: When final judgment has been rendered in favor of the person alleged to be entitled, he may recover, by action, the damages which he has suffered in consequence of the defendant's usurpation. (Code Civ. Pro., Sec. 1953; Kessel v. Zeiser, 102 N. Y. 114; Stemmler *v.* Mayor, 179 N. Y. 473.)

ARTICLE VIII

EQUITY

Equity has no jurisdiction over the appointment and removal of public officers, even at the instance of a taxpayer (*ante*, p. 156).

There is, however, authority for the proposition that, when a citizen's political rights are threatened, he may maintain a suit in equity for an injunction and protect his rights by securing a temporary injunction. (Brown *v.* Cole, 54 Misc. 278, Spencer, J.) In the case cited, Spencer, J., granted a temporary injunction at the instance of a republican elector of Fulton County, restraining the defendant, as chairman of the republican county committee, from carrying into execution a system of enrollment for republican voters in that county. Spencer, J., started with the proposition that interference by injunction is among the highest prerogatives of a court of justice, conceded that there are many decisions to the effect that the powers of the court may *not* be invoked to protect the political rights of a citizen or to restrain, direct or control the methods of a political party, and concluded that the "old doctrine" that political rights were beyond the domain of judicial investigation has been "swept away," that there "no longer remains any distinction between the civil and

political rights of citizens" and that every wrong now has its remedy. On the trial, Van Kirk, J., dismissed the suit, but without costs and without commenting on Spencer, J's., sweeping decision (105 Supp. 196).

ARTICLE IX

ACTION FOR DAMAGES AGAINST ELECTION OFFICERS

At common law, if election officers wilfully and maliciously refused to receive the vote of a qualified voter, he could maintain an action to assert his right and recover damages against them. (Ashby *v.* White, 2 Lord Raymond, 938; Jenkins *v.* Waldron, 11 Johnson, 114.) If any such right still exists under the present statute, where a qualified voter may always compel the receipt of his vote by mandamus (*ante*, p. 16), malice is undoubtedly a necessary element to the action. (Lurman *v.* Jarvie, 82 App. Div. 37, 45.)

Part Fourth

CRIMES RESPECTING THE ELECTIVE FRANCHISE

ARTICLE I

IN GENERAL

The statute law of the state makes a crime of virtually every act or omission, whether of voter or election officer, which is not in substantial accordance with the provisions of the election law. Many of these statutory provisions are contained in the penal law, but many of them are also scattered through the election law, without any attempt at systematic arrangement. Indeed, many of them overlap one another, and there is urgent need for systematic codification by the legislature. These various provisions will be briefly considered, although it will be impossible, for the purposes of this book, to attempt anything approaching a complete codification.

ARTICLE II

ENROLLMENT

The election law, by an amendment passed in 1913 (Laws of 1913, Chap. 587), makes the signing and mailing or delivery of an enrollment blank, false in any respect, a misdemeanor (Sec. 184).

ARTICLE III

PRIMARY ELECTIONS

The penal law sets forth thirteen different sets of acts constituting "misdemeanors at or in connection with political caucuses, primary elections, enrollment in political parties, committees and conventions" (Sec. 751). These include acts by voters, such as illegal voting, illegal enrollment, interference with voting or canvass of votes, bribery and taking a bribe, and generally any act tending to affect the result of a primary election or convention. They also include acts by officers, tellers, canvassers, election inspectors, primary inspectors, custodians of primary records, clerks, employees and any officer of a political committee or a convention. These acts consist in violating the election law, permitting anyone else to do so or refusing to do any act required by the election law, particularly in relation to primaries, enrollment and conventions.

The penal law also sets forth five sets of acts constituting a misdemeanor in relation to designating petitions, such as paying voters to sign the same or promising employment for that purpose and paying any person for services in procuring signatures upon the basis of the number of names procured by such person, or at a fixed amount per name (Sec. 760a).

The election law, in an abundance of precaution, also makes any violation of the articles of the election law relating to enrollment, party organization, designation, conduct of primary elections and conventions a misdemeanor (Sec. 93).

Perjury: It also declares all oaths administered under

the provisions of those articles, except that relating to conventions, to be oaths required by law and necessary for the ends of public justice (Sec. 94).

ARTICLE IV

REGISTRATION *

TITLE 1.—FALSE REGISTRATION

The penal law sets forth five sets of acts constituting false registration, which is made a felony punishable by imprisonment for not more than five years (Sec. 752). These include illegal registration, attempts thereat, and unlawfully permitting or advising another to commit any such act.

TITLE 2.—MISCONDUCT OF REGISTRY OFFICERS

The penal law makes the wilful violation by any member or clerk of a registry board of any provision of the election law relative to registration, or the wilful neglect or refusal to perform any duty imposed by law, or fraud in the execution of such duties, a felony punishable by imprisonment for not more than ten years (Sec. 753).

TITLE 3.—REGISTRY LIST

The penal law makes the destruction, removal or mutilation of any list or register of voters a misdemeanor (Sec. 754). The election law makes the same act in relation to the public copy of registration a felony (Sec. 184).

* NOTE. Registration itself made a felony (*ante*, p. 22).

TITLE 4.—PERJURY—CHALLENGE AFFIDAVIT

The election law makes it perjury to incorporate any false statement in any challenge affidavit or to take a false oath before a board of inspectors. Suppressing, altering or mutilating a signed challenge affidavit is also a felony (Sec. 184).

TITLE 5.—ASSISTING FALSE REGISTRATION

The penal law makes it a misdemeanor for any person dwelling in a building in a city to wilfully refuse to truly answer any question, or to give any false answers to any question relating to the residence and qualifications as a voter of any person dwelling in such building, or of any person who appears on the register as residing thereat, or to knowingly harbor or conceal any person who has falsely registered as a voter, or to rent a room or bed to any person to be used for the purpose of unlawfully registering or voting therefrom (Sec. 757).

TITLE 6.—FALSE REGISTRATION FOR SPECIAL ELECTION

The election law prohibits an elector from registering in one election district for a special election while his name appears on the register of another district to be used at that election and makes the violation thereof a felony punishable by imprisonment for not less than two nor more than five years (Sec. 160).

ARTICLE V

IMPEDING SUPERINTENDENTS OF ELECTIONS

The election law, in the article dealing with superintendents of elections, prescribes various felonies and misdemeanors.

It is a misdemeanor to neglect or refuse in a proper case to furnish information or exhibit records, papers and documents (Sec. 475).

It is a felony to fail, on demand of a superintendent or deputy, to render the aid or assistance demanded, or to wilfully hinder or delay him. The penalty is not more than three years' imprisonment. If the offender is a public officer, which includes a police officer or deputy sheriff, he forfeits his office in addition (Sec. 476).

It is a misdemeanor to disobey a subpœna attested in the name of a superintendent or to refuse to testify under oath (Sec. 477).

It is a felony to make a false statement under oath (Sec. 478).

It is a misdemeanor for a landlord, proprietor, lessee, keeper or lodger to violate the law as to reports (Sec. 480).

It is a misdemeanor for the holder of a liquor tax certificate to violate the law as to affidavits; and, if he incorporates any false statement therein, he becomes guilty of perjury and in addition forfeits his liquor tax certificate (Sec. 481).

It is a misdemeanor for an owner or lessee to neglect to furnish a list of male residents when demanded by a superintendent. If the owner furnishes a list containing a false name or a false period of residence, he is guilty of a felony. If a lessee furnishes a false list, he is liable for a penalty of one thousand dollars (Sec. 484).

ARTICLE VI

CERTIFICATES OF NOMINATION AND OFFICIAL BALLOTS

The penal law provides that a person is punishable by imprisonment for not more than five years if he falsely

makes oath to or defaces or destroys a certificate of nomination, files or receives a certificate knowing any part thereof was falsely made, suppresses a certificate which has been duly filed, forges or falsely makes the official indorsement on any ballot or, having charge of ballots, suppresses them, except as provided by law (Sec. 760).

ARTICLE VII

OFFICIAL BALLOTS

Failure to Deliver: The penal law provides that any person who has undertaken to deliver official ballots and neglects or refuses to do so is guilty of a misdemeanor (Sec. 761).

Improper Use of Pasters: The election law makes the use of any paster on an official ballot otherwise than provided by law to be a felony, punishable by imprisonment for not less than one nor more than five years (Sec. 137).

Defacing Voted Ballots: The election law provides that any person who places any mark upon any ballot taken from the ballot box or tears or defaces the same, with the intent of causing such ballot to be regarded as void, is guilty of a felony punishable by imprisonment for not less than five nor more than ten years (Sec. 371).

ARTICLE VIII

REFUSAL TO PERMIT EMPLOYEES TO ATTEND ELECTION

The penal law makes it a misdemeanor for a person or corporation to refuse to any employee entitled to vote at an election the privilege of attending thereat, or subjects

such employee to a reduction of wages because of the exercise of such privilege (Sec. 759).

ARTICLE IX

ILLEGAL VOTING

The penal law sets forth five different sets of acts constituting illegal voting which relate not only to voting, offering or attempting to vote, but also to procuring, aiding, assisting, counseling or advising illegal voting. Any person who does any such act is guilty of a felony, punishable by imprisonment for not more than five years (Sec. 765).

ARTICLE X

GENERAL ELECTIONS—ELECTION OFFICERS

The penal law sets forth eighteen sets of acts constituting "misdemeanor in relation to elections." These include acting as an election officer without being able to read and write the English language, or without being otherwise qualified to hold such office; knowingly permitting any person to vote who is not entitled to vote; removing any official ballot from a polling place before the closing of the polls; unlawfully going or remaining within the guard-rails; placing any mark upon a ballot with the intent that it may thereafter be identified, wilfully disobeying any lawful command of an inspector, and many others (Sec. 764).

The penal law also provides that a public officer who omits, refuses or neglects to perform any act required of him by the election law, or refuses to permit the doing of

any act authorized thereby is punishable by imprisonment for not more than three years or by a fine of not more than three thousand dollars or both (Sec. 763).

The election law provides a penalty of one hundred dollars for an election officer who fails to take the oath of office or wilfully neglects or refuses to discharge his duties or, if removed, to turn over the register and other papers to his successor (Sec. 310).

The election law makes the violation of the oath taken by election officers and other persons assisting disabled and illiterate voters a felony, punishable by imprisonment for not less than two nor more than ten years (Sec. 357).

The penal law makes it a misdemeanor for any election officer or watcher to reveal how a voter has voted, or to communicate his impression on that point; also to unfold, before the closing of the polls, a ballot which a voter has prepared for voting (Sec. 762).

The election law makes it a felony for any person to prompt a voter, previously challenged at registration, in answering any questions put to him on election day (Sec. 355).

The penal law provides that an inspector or poll clerk who intentionally makes a false canvass or a false statement of the result or any person who induces or attempts to induce any inspector or clerk so to do is guilty of a felony (Sec. 766).

The election law also provides that any election officer who signs a statement of canvass at any place except the polling place, or at any time except immediately after the canvass is completed or who takes a statement from the polling place before it is signed is guilty of a felony, punishable by imprisonment for not less than two nor more than five years (Sec. 366).

The election law imposes on the chairman of the board the duty of certifying to the facts necessary to make up

the pay-roll and makes it a misdemeanor to wilfully make a false certificate (Sec. 309).

The election law makes it a misdemeanor to leave the space within the guard-rail before delivering back all ballots received (Sec. 359).

The election law prohibits the sale of intoxicating liquors, ale or beer in a polling place and provides that any person so doing is guilty of a misdemeanor (Sec. 299).

The election law provides that the provisions of the penal law and its provisions relating to misconduct at elections shall apply to elections with voting machines. It also makes it a felony, punishable by imprisonment for not less than one year nor more than five years to tamper with any voting machine or for any election or police officer or assistant to permit any such interference (Sec. 417).

ARTICLE XI

NATURALIZATION CERTIFICATES

The penal law provides that any person who knowingly or wilfully procures a certificate of naturalization to enable himself or any other person to vote when he or such person is not entitled to become a citizen or to exercise the elective franchise is guilty of a felony (Sec. 777).

The penal law also makes it a felony for any person to knowingly and wilfully present a certificate of naturalization, fraudulently secured, with intent to enable any person to vote at any election when such person is not entitled to become a citizen or to exercise the elective franchise (Sec. 778).

ARTICLE XII

LEGAL EXPENDITURES AND CONTRIBUTIONS; SOLICITING FROM CANDIDATES—STATEMENT OF CANDIDATES

TITLE 1.—LEGAL EXPENDITURES

The penal law distinguishes between legal expenditures and contributions. It makes it a misdemeanor for any person to supply meat, drink, tobacco, refreshment or provisions, other than as part of the traveling expenses of candidates, political agents, committees or public speakers, or to pay, lend or contribute any money or other valuable consideration for any other purpose than a list of purposes which are known as "legal expenditures." This list includes rent of halls, compensation of public speakers, music, fireworks, carriages, food for watchers, traveling expenses and the like (Sec. 767).

TITLE 2.—LIMITS OF AGGREGATE LEGAL EXPENDITURES AND CONTRIBUTIONS

The penal law limits the amounts to be expended by a candidate for a public office either for legal expenditures or contributions to political committees or for any other purpose, and makes it a misdemeanor for any candidate to expend an amount in excess thereof (Sec. 781). These limitations are as follows:

Candidate for governor.....	$10,000
Candidate for any other elective state office except a judicial office.....	6,000
Candidate for congress or presidential elector.....	4,000

Candidate for state senator. . . .	$2,000
Candidate for assembly.	1,000
Other candidates.	500 and $3 for each 100 votes cast in such district at the last state election in excess of 5,000 votes.

TITLE 3.—JUDICIAL CANDIDATES

The penal law provides that no candidate for a judicial office shall make any contribution, nor shall any contribution be solicited of him; but he may make "legal expenditures" (Sec. 780).

TITLE 4.—SOLICITATIONS

The penal law authorizes a request for a contribution of money by an authorized representative of the political party, organization or association to which a candidate for an elective office belongs; but otherwise it makes it a misdemeanor for any person to solicit money or other property from a candidate, or to seek to induce a candidate to purchase any ticket, card or evidence of admission to any ball, picnic, fair or entertainment of any kind (Sec. 779).

The penal law also makes it a misdemeanor for any person to solicit money or other property from a candidate for an elective office, as a consideration for favorable newspaper publication (Sec. 755).

TITLE 5.—CANDIDATES' STATEMENTS

The penal law provides that every candidate, within ten days after election, must file an itemized statement showing in detail all moneys contributed or expended by him, by himself or through any other person, in aid of his election, and that any candidate for office who refuses

or neglects to file such a statement shall be guilty of a misdemeanor and shall also forfeit his office (Sec. 776). This statement is in addition to the statement required by the corrupt practices act (*ante*, p. 133).

The provision punishing the failure to file a statement with forfeiture of office has been held, to that extent, to violate the provision of the constitution prescribing the oath of office for all officers, executive and judicial, except such inferior officers as may be exempted by law, and providing that "no other oath, declaration or test shall be required as a qualification for any office of public trust." (Stryker *v.* Churchill, 39 Misc. 578, Herrick, J.; see also People *ex rel.* Bishop *v.* Palen, 74 Hun, 289; Rathbone *v.* Wirth, 6 App. Div. 277; Matter of David, 44 Misc. 192).

ARTICLE XIII

POLICE IN POLITICS

The penal law sets forth three sets of acts concerning "misconduct concerning police commissioners or officers or members of any police force" (Sec. 756). These are designed to keep the police out of politics and eliminate any use of official power in aid of or against any party or organization, such, for instance, as transferring an officer because of party adherence, contributing or receiving any moneys for any political fund or becoming a member of any political club.

ARTICLE XIV

CONSPIRACY

The penal law provides that conspiring by two or more persons to promote or prevent the election of any person to a public office by the use of any means which are pro-

hibited by law is punishable by imprisonment for not more than one year (Sec. 773).

ARTICLE XV

GIVING AND RECEIVING CONSIDERATION FOR FRANCHISE

The penal law defines at considerable length and in great detail both the giving consideration for franchise (Sec. 768) and the receiving consideration for franchise (Sec. 769). Both are made felonies. The punishment for giving also includes forfeiture of office and incapacity to hold any office for five years after conviction and the punishment for receiving also includes the exclusion from the right of suffrage for five years after conviction.

ARTICLE XVI

DURESS OR INTIMIDATION OF VOTERS

The penal law makes it a misdemeanor for any person or corporation to be guilty of duress or intimidation of voters, and provides that, if a corporation, it shall, in addition, forfeit its charter. This provision incidentally makes special reference to the use of "pay envelopes" upon which there is written or printed any political motto or device, containing threats, calculated to influence the political opinions or actions of employees (Sec. 772).

ARTICLE XVII

USE OF POSITION OR AUTHORITY—POLITICAL ASSESSMENTS

The penal law sets forth four sets of acts which it defines as "corrupt use of position or authority" and punishes by imprisonment for not more than two years or by a fine of not more than three thousand dollars or both (Sec. 775), and six sets of acts consisting of use of position or authority to compel or induce "political assessments" and punishable as a misdemeanor (Sec. 774).

ARTICLE XVIII

EVIDENCE

The penal law provides that any person offending against any section of the article dealing with the elective franchise is a competent witness against any other person so offending, but the testimony so given shall not be used against the person testifying (Sec. 770).

ARTICLE XIX

PENALTIES

TITLE 1.—MISDEMEANORS

Any person convicted of a misdemeanor under the article of the penal law relating to the elective franchise shall be punished, for a first offence, by imprisonment for not more than one year or by a fine of not less than

one hundred dollars nor more than five hundred dollars or both such fine and imprisonment. Any person convicted of a misdemeanor for a second or subsequent offence shall be guilty of a felony (Sec. 782).

TITLE 2.—FELONIES

Punishment for a felony for which no other punishment is specially prescribed is punishable by imprisonment for not more than seven years or by a fine of not more than one thousand dollars or both (Sec. 1935).

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